(11)

No. 91-535

In The

Supreme Court of the United States

October Term, 1991

ALAN B. BURDICK,

Petitioner,

vs.

MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii; and BENJAMIN CAYETANO, in his capacity as Lieutenant Governor of the State of Hawaii,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF

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QUESTIONS PRESENTED

1. Whether, despite the opportunities voters in Hawaii enjoy to cast, and have counted and published, votes for their preferred candidates, Hawaii's election laws are void under the First and Fourteenth amendments because write-in votes may not be cast at Hawaii's elections?

2. Whether the election booth in Hawaii is an unlimited public forum such that, whether or not Hawaii would seat a write-in candidate who garnered the support of a plurality of voters, the Constitution requires Hawaii to allow write-in "votes" without restriction at both its primary and general elections, and to count and publish such "votes"?

PARTIES BEFORE THIS COURT

Respondent Morris Takushi is and at all relevant times has been the Director of Elections of the State of Hawaii, and, under the direction of the Lieutenant Governor of Hawaii, is by law (Haw. Rev. Stat. § 11-5 (1985)), charged with the preparation of the ballots for Hawaii elections. Respondent John Waihee was, in 1986, when D.C. Civil No. 86-0582 was filed in the United States District Court for the District of Hawaii, the Lieutenant Governor of Hawaii and the State of Hawaii's chief elections officer. *See* Haw. Rev. Stat. § 11-2 (1985). Respondent Waihee was elected Governor in 1986, and was succeeded in office by Respondent Benjamin J. Cayetano. Respondent Cayetano, along with Respondent Takushi, was named as a defendant in No. 88-0365, and was re-elected to office in November, 1990. All Respondents were named in the courts below solely in their official capacities in this federal suit for equitable relief, and, therefore, so appear in this Court in those capacities.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Hawaii election law (Chapters 11, 12, 16, and 17, Hawaii Revised Statutes ("HRS")), as now in force, together with Article III, § 4 of the Hawaii Constitution (Supp. 1991), which give rise to, and are enforced by, the prohibition on write-in voting in Hawaii, are reprinted in Appendix ("App.") A to this Brief. The Act of January 3, 1893, Ch. 79, *Stat. L. Liliuokalani* 229 (1892), the original statute in Hawaii prohibiting write-in voting, is printed in App. B. Article I, § 4, clause 1 of, Article II, § 1, clause 2 of, and the Tenth Amendment to the Constitution are printed in App. C.

STATEMENT OF THE CASE

The issue in this case is whether the two-stage process by which Hawaii has elected its political leaders for decades is facially void under the United States Constitution merely because Hawaii does not allow the casting of "write-in" votes.

Answering in the negative, the panel below reversed an unprecedented federal injunction directing Hawaii to permit write-in votes to be cast, and then to count and publish all such votes, without limit. Applied generally, the injunction would have nullified the laws of more than thirty States that, to varying degrees, limit voter choice on election day, and, hence, do not allow the unlimited write-in voting sought here.

In reversing the District Court's novel and intrusive decree, the Ninth Circuit remanded Petitioner Alan Burdick to the generous nomination procedures Hawaii has provided to voters who seek to cast votes for preferred candidates.

Under those procedures, voters can place the name of any eligible, willing candidate on the primary ballot by a petition, filed the last week in July, signed by 15 registered voters (25 registered voters for statewide or federal elective office).

To advance to the general election, candidates must win a party primary, or, if they are a non-partisan (independent) candidate running without any party status, win a certain number of primary votes. For candidates who choose the independent route, Hawaii has thus erected a vehicle for triggering ballot access "that serves to promote the very First Amendment values that are threatened by overly burdensome ballot access restrictions." *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986). However, because of procedures available to independents and new parties that guarantee placement on the November ballot by the filing of signatures in numbers equal to 1 per cent of the registered vote in the last election, our election laws are even more liberal than Washington's, which were upheld in *Munro*. The issue here is thus whether, in light of these opportunities to cast an effective vote, the Ninth Circuit properly rejected Alan Burdick's facial attack on Hawaii's ban on write-in votes, and , relatedly, refused to compel Hawaii to publish a proposed write-in "protest" that "none of the above" candidates merited support on election day.

I. How the Hawaii Electoral System Works.

Like numerous States,[1] Hawaii believes a primary "is 'an integral part of the entire election process' " that acts

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[1] Representative government began in Hawaii with the commencement of Hawaii's constitutional monarchy in 1840, which guaranteed a popularly elected House of Representatives, with a veto over proposed legislation. *See* Const. Kamehameha III (1840), *reprinted in Fundamental Law of Hawaii* 6 (1904) ed.).

" 'to winnow out and finally reject all but the chosen candidates.' " *See Munro*, 479 U.S. at 196. Under this process, write-in votes are not permitted either at the primary or the general election. Instead, Hawaii law provides, in its "open primary" system,[2] three distinct, broad, avenues by which citizens may turn support for preferred candidates into a vote on election day.

A. Hawaii's Opportunities for Electoral Participation

1. The Party-Petition Route.

The presumptive avenue for assuring that votes for a candidate will be counted at the November election is the party-petition route. HRS § 11-62 (Supp. 1991). A party may be formed for "any group of persons" garnering "signatures of currently registered voters" equal to not less than one percent of the total registered voters of the State as of the last preceding general election. *Id.* §§ 11-62(a)(3). At least 20 other States require as many on a percentage basis.[3] Petition signers need not be members

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[2] *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 223 n.11 (1986) (Hawaii is one of 9 States "in which all registered voters may choose in which party primary to vote").

[3] Alabama (Ala. Code § 17-7-1(a)(3) (1987)); Alaska (Alaska Stat. § 15.25.160 (1988)); Arizona (Ariz. Rev. Stat. Ann. § 16.341.E (Supp. 1991)); California (Cal. Elec. Code § 6831 (West 1977)); Connecticut (Conn. Gen. Stat. Ann. § 9-453d (West 1989)); Delaware (Del. Code Ann. tit. 15, § 3002(b) (1981)); Florida (Fla. Stat. Ann. § 9-103.021(3) (Supp. 1992)); Georgia (Ga. Code Ann. §§ 21-2-170, 34-1010 (1990)); Michigan (Mich. Comp. Laws Ann. § 168.590b.(2) (Supp. 1991)); Missouri (Mo. Ann. Stat. § 115.321.3 (Supp. 1992)); South Dakota (S.D. Codified Laws Ann. § 12-7-1 (1982)); and Texas (Tex. Elec. Code Ann. § 142.007(1) (Vernon 1986)), have a 1% rule. Indiana

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of the "group of persons desiring to qualify" (*cf.* HRS § 11-62(a) *with id.* § 11-62(a)(3)), and as few as two people may start a party. A voter may sign multiple petitions, and still vote in the primary for any other party's primary candidates, or for nonpartisans.[4]

The party filing deadline, 150 days before the primary, occurs in mid- to late April. In late July, sixty days before the primary, those who seek to run a candidate in a party primary must file nomination papers containing 25 signatures of registered voters for statewide or federal office (15 in state legislative and county races). *See* HRS §§ 12-2.5, 12-5, 12-6. A nominating voter need not pledge support for a candidate, nor be a party member. *Id.* §§ 12-3, 12-4. Candidates must certify they "will qualify

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(Ind. Code Ann. § 3-8-6-3 (Burns 1988)); North Carolina (N.C. Gen. Stat. § 163-122(a)(1) (1991)); and Pennsylvania (Pa. Stat. Ann. tit. 25, § 2911(b) (Supp. 1991)), have a 2% rule. Maryland (Md. Elec. Code Ann. art. 33, § 4B-1(h) (1990)); New Mexico (N.M. Stat. Ann. § 1-8-51C (1991)); Nevada (Nev. Rev. Stat. § 24-293.200.1 (1991)); and Oregon (Or. Rev. Stat. § 249.740(a) (Supp. 1991)), have a 3% rule. Louisiana (La. Rev. Stat. Ann. § 441 (West 1979)); and Wyoming (Wyo. Stat. § 22-5-304 (Supp. 1991)), have a 5% petition requirement. In Hawaii, the 1% rule, in 1986 when these cases began, required 4,189 signatures. *See* Clerk's Record ("C.R.") 13 in No. 86-0582, J.A. 67; *see also* attachments to Exh. "T" (C.R. 48). Petitioner also admits that at least six States, including Arkansas, Illinois, Kentucky, New York, North Dakota, Ohio, and South Carolina, as a result of non-percentage rules, require at least that many signatures for statewide contests. App. to Appellees' Ans. Br., Nos. 86-2689, 86-2703 (9th Cir. Apr. 1987) (C.R. 31 in No. 86-0582); *see also McClain v. Meier*, 851 F.2d 1045, 1047 (8th Cir. 1988) (7,000 signatures (1.6% rule)).

[4] *Compare* HRS § 11-62(a)(3) (no limit on number of party petitions that may be signed), *with Munro*, 479 U.S. 198-99 (confining voter to a single nominating act); *American Party of Texas v. White*, 415 U.S. 767, 785 n.17 (1974) (same).

under the law for the office," must declare their "residence address[,]" must affirm "[they are] a member of the party" under whose banner they run, and pledge "support" for the state and federal constitutions. *Id.* §§ 12-3, 12-7.

New party candidates are selected at Hawaii's open primary, held the last week in September, and may "campaign among the entire pool of registered voters," *Munro*, 479 U.S. at 197. Unlike the minor parties in Washington at issue in *Munro*, new party candidates need not obtain any minimum number of votes at the primary to advance. The April filing guarantees a new party the right to place its primary winners on the November ballot.

Importantly, the "party petition" avenue is in effect open not only to new and minor parties, but to independent candidates who wish to run free of "a state-wide, on-going organization." *Cf. Storer v. Brown*, 415 U.S. 724, 745 (1974). Thus, while a new-party petition must be accompanied by "names and addresses of the officers of the central committee and of the respective county committees of the political party and by the party rules," HRS § 11-62(a)(4), the law does not state a party may be disqualified if it has *no* officers, committees, or rules. *See* HRS, §§ 11-63, 11-64. Likewise, a new party can easily organize around a single candidacy. Thus, if John Smith and a friend wish to form "the John Smith Party," if they obtain the requisite signatures and lawfully nominate Smith, and if Smith is eligible to hold office, Smith will be in the September primary and will advance to the November ballot if anyone votes for him in the primary. *Id.* §§ 12-21, 12-41. If no one else is running, Smith then will be "elected" at the primary.[5]

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[5] Not faced with the "pressure of conducting a petition drive in adverse winter weather," *see Bradley v. Mandel*, 449 F. Supp. 983, 986 (D. Md. 1978), minor parties have fared relatively well in Hawaii, even holding aside Presidential

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2. The Established Party Route.

Hawaii, like most States, exempts certain political parties desiring to place candidates' names on the

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elections, as to which there is a special late-filing rule, *see* HRS § 11-113. The 1976-1986 history of third party candidates in non-presidential elections is as follows:

In 1976, Libertarians appeared for United States Senate, and the Second Congressional District; People's Party candidates appeared for United States Senate, the Second Congressional District, State House District 18, Hawaii County Council, and Maui County Council; Independents for Godly Government appeared for both Congressional Districts, State House Districts 5, 8, 11, 13, 22, and 23, Maui County Mayor, Maui County Council, and Kauai County Council. *See* J.A. 216-220. *In 1978*, Libertarians appeared for both United States House seats, and Governor/Lieutenant Governor; Aloha Democratic Party candidates did so in races for the First Congressional District, and Governor/Lieutenant Governor. *See* J.A. 222. *In 1980*, Libertarians appeared for United States Senate, both United States House seats, State Senate District 6, State House Districts 6 and 25, Maui County Council, and Honolulu Mayor. *See* J.A. 230-237, *In 1982*, Libertarians appeared for both United States House seats, State Senate District 22, Honolulu County Council (2 seats), and Kauai County Council; Independent Democrats appeared for the United States Senate, Governor/Lieutenant Governor, State Senate District 12, State House Districts 9, 11, 23, 25, 48, and 49, Maui County Council, and Kauai County Council. *See* J.A. 244-54. *In 1984*, Libertarians appeared for both United States House seats, and Honolulu Mayor. *See* J.A. 258-66. *In 1986*, Libertarians appeared for both United States House seats. *See* J.A. 272.

After the 1986 filing deadline, the Legislature amended the election code to allow new parties to avoid petitioning for November ballot placement for a ten year period if they successfully petitioned in three successive elections. *See* HRS § 11-63 (Supp. 1991). The Libertarian Party, in light of this rule, and its past petitioning efforts, is now an established party, and will remain so until 1996, and, potentially, until 2000.

November ballot from petitioning or other requirements. These exemptions are determined by a demonstration of "historically established broad support." *See Jenness v. Fortson*, 403 U.S. 431, 441 (1971). To obtain an exemption, Hawaii requires a showing of ten percent in any preceding state-wide or congressional race, or analogous showings if candidates ran in state legislative races, HRS §§ 11-61(b)(1)-(5). Under HRS § 11-61 and 62, "if a party qualifies through petition for three consecutive elections, it will be deemed a political party for the following ten year period." Haw. H. Stand. Comm. Rep. No. 762-86, *reprinted in* 1986 Haw. H.J. 3170 (commenting upon HRS § 11-62(d) (Supp. 1991)). *See* App. 58, *infra*. At present, the Democratic, Libertarian, and Republican parties are established parties in Hawaii. *See supra* note 5.

The established party nominees are chosen in the same manner as the nominees of a "new" party. Established party candidates first must properly file and run in their party's primary, and the primary winner advances to the November election ballot, unless Hawaii's runaway primary winner rules render the primary winner the victor at the primary stage. *See infra* pp. 12-13.

3. The Non-Partisan Primary Route.

Hawaii's third route to November ballot position is placement on the non-partisan primary ballot. Non-partisans need not have party sponsorship, but run in a separate primary on primary day. HRS § 12-22. To enter, non-partisans need only meet the minimal petition and filing requirements set forth in HRS §§ 12-3 – 12-7. A truly minimal show of support (15 petition signatures for county and state legislative races and 25 signatures for other races) is needed.

Non-partisans then may advance under HRS § 12-41, which has been interpreted by the Supreme Court of Hawaii as follows:

> The candidate of a qualified party may obtain nomination by securing any number of votes, no matter how few, if they constitute a plurality of votes cast for candidates of that party, while a nonpartisan candidate must receive a minimum number of votes [*i.e.*, 10% of the primary vote]. That minimum number, however, can never be more than the number of votes which has been sufficient to nominate a partisan candidate[.]

Hustace v. Doi, 60 Haw. 282, 289-90, 588 P.2d 915, 920 (1978). Eight of 26 nonpartisans who entered primaries between 1976-86 gained November ballot position, many with vote totals much smaller than candidates who lost in the party primaries.[6]

B. Hawaii's Prohibition on Write-in Voting.

Hawaii election law, like that of most States, nonetheless has limits, one of which, as the Supreme Court of Hawaii held in this case,[7] is a prohibition on "write-in" votes. First intended to redress alleged vote-buying in

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[6] *See* Exh. "F" at 14, Clerk's Record ("C.R.") 47, No. 86-0582 (D. Haw. Apr. 19, 1990). Between 1976-1986, nonpartisans appeared on the November ballot for U.S. Senate (1976), Maui Council (1976 and 1980), Governor/Lieutenant Governor (1978), Honolulu Mayor (1980), U.S. House (1982), and Honolulu city council (1982). See the returns at J.A. 216, 220, 222, 236, 244, 253.

[7] *Burdick v. Takushi*, 70 Haw. 498, 776 P.2d 523 (1989).

Hawaii's elections in the late 19th century.[8] Hawaii's strong version of the Australian ballot reform serves many compelling interests.

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[8] Hawaii's early election laws allowed write-in voting, and mandated, on the government-printed ballots, the reservation of "[s]ufficient space" "to permit the erasure of all the names thereon, and the substitution of an equal number therefor." Act of Nov. 15, 1890, Ch. 86, § 57, 1890 Haw. Sess. L. 191, 215. However, as on the mainland, the unregulated ballot led to widespread charges of vote-buying and other sorts of abuse. *See generally* L.E. Fredman, *The Australian Ballot: The Story of an American Reform* (1968). Thus, on January 3, 1893, Queen Liliuokalani signed into law reforms which prohibited any person "to stand as a candidate for election unless he shall be so requested in writing, signed by not less than twenty-five duly qualified electors of the district in which such election is ordered; which request shall be deposited with the Minister of the Interior not less than twenty-one days before the day of such election [7 days on Oahu]," thus substituting a system of pre-election nominations for the process of write-in nominations on election day. Act of January 3, 1893, Ch. 89, 1888-92 Haw. Sess. L. 229-30, App. 62-65, *infra*. Ultimately, reform came too late to save the Queen, as the monarchy was toppled two weeks later amidst charges she failed to redress the "steadily increasing corruption of electors." Proclamation of the Committee of Public Safety dated Jan. 17, 1893, *Laws of the Prov. Gov't of the Hawaiian Islands* iii (1894), App. 67, *infra*.

As a result of the revolution of 1893, new laws strictly regulated the voting process by providing for the printing of candidates' names, marking a voter's choice with a cross "in the space or spaces provided for such purpose," and the nullification of any ballot containing "any mark or symbol whereby it may be identified, or any mark or symbol contrary to the provisions hereof." *See Holstein v. Young*, 10 Haw. 216, 221 (1896). Given that "the main object of the present system of voting is to secure secrecy of the ballot," *id.* at 222, the law was construed to prohibit any marks other than the cross next to a printed name, and, a fortiori, write-in voting. *Id.*

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1. What the Prohibition Does.

Hawaii's ban on write-in voting plays an essential role in defining "the structure of [state] government," *see Gregory v. Ashcroft*, 111 S. Ct. 2395, 2400 (1991), and the "time, place, and manner" by which Hawaii chooses its representatives to the National government. U.S. Const. art. I, § 4; *id.* art. II, § 1.

a. The Interest in Protecting the Primary System

Hawaii's ban on write-ins makes clear that the primary is " 'an integral part of the entire election process' " that " 'functions to winnow out and finally reject all but the chosen candidates.' " *Munro*, 479 U.S. at 196. It does this is two ways. First, by making the primary count, the ban bars the carrying of intra-party feuds into the general election. *Id.* Second, the ban ensures that the primary *can* count, constitutionally, by protecting the associational rights of the parties against strategic voting and "party raiding" by write-in votes.

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In *Jenson v. Turner*, 40 Haw. 604 (1954), the Supreme Court of Hawaii specifically confirmed that provisions of Hawaii law that render void ballots marked "in any way" "contrary to the provisions of" the election law impliedly prohibit write-in voting. *See* Rev. L. Haw. § 237 (1945), *recodified at* HRS § 16-26(1) (1985). Hawaii election officials and the Hawaii Attorney General thereafter consistently viewed the law to bar write-ins (*see* J.A. 36), and, in 1989, the Hawaii Supreme Court authoritatively resolved the issue, both as a state constitutional and statutory matter, relying on the reasoning of this Court in *Munro* and provisions of Hawaii law that require "[a]ll candidates" to be nominated through one of the three routes noted above, and which require the primary ballots "to contain the names of all nonpartisan candidates." Pet. App. 54-55.

i. The Interest in Confining Intra-Party Feuds

By reserving the general election for "major struggles," *Storer*, 415 U.S. at 734, Hawaii seeks to permit a "winner in the general election [to enter office] with sufficient support to govern effectively." *Id.* It is this central evil of "unrestrained factionalism at the general election" at which the ban takes aim. *See Munro*, 479 U.S. at 196.

Many other States do likewise. The statutes of Nevada, Oklahoma, and South Dakota flatly ban write-ins,[9] while Louisiana and Texas ban write-ins at run-off elections.[10] Washington provides "[t]hat no write-in vote for a partisan office at a general election shall be valid for any person who has offered himself as a candidate for such position for the nomination at the preceding primary." Wash. Rev. Code Ann. § 29.51.1704 (Supp. 1986). Illinois, New Mexico, and Ohio,[11] follow Washington's lead, while Kentucky and Nebraska ban write-in votes for various offices at the general election.[12]

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[9] Nev. Rev. Stat. § 293.270(2) (1991); Okla. Stat. Ann. tit. 26, § 71-127 (Supp. 1989); S.D. Codified Laws Ann. § 12-16-1 (1982 & Supp. 1990).

[10] *See* Texas Code Ann. § 146.002 (Vernon 1986) (banning write-ins in run-off). Louisiana does not have an express bar on write-ins at the run-off, but apparently does not count them as indicated by the recent gubernatorial election in that State.

[11] Ill. Ann. Stat. ch. 46, ¶ 17-16.1 (1991); N.M. Stat. Ann. § 1-12-19.1(E) (Supp. 1985); Ohio Rev. Code Ann. § 3513.04 (1989).

[12] Ky. Rev. Stat. § 117.265(3) (no write-ins for Pres. electors); Neb. Rev. Stat. § 32-428 (1988) (other offices).

ii. The Interest in Preventing "Party Raiding."

Relatedly, Hawaii seeks to make its state-run primary constitutional by ensuring that the parties are protected against "raiding," the phenomenon where voters of one party sabotage the results of another (usually a weaker) party's primary. *See Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973).

At the primary, the ban, like Alaska's law, *see* Alaska Stat. § 15.25.070 (1988), and those of at least a dozen other States, reflects the view that primary write-ins are " 'inconsistent with the whole theory of primary elections.' " *State Administrative Board v. Calvert*, 272 Md. 659, 327 A.2d 290, 299 (1974), *cert. denied*, 419 U.S. 1110 (1975).[13] Thus, the ban on primary write-ins makes meaningful those candidate filing rules which protect party autonomy (*e.g.*, HRS § 12-3(7) (certification "that the candidate is a member of the party")) and the processes available to the parties, before the primary occurs, for challenging a "raiding" candidate. *See* HRS § 12-8.

b. The Interest in Finality in Runaway Campaigns.

The ban on write-in voting gives finality to the primary in a further respect. In all county elections, and in

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[13] In addition to Alaska's law, *see supra* n. 9 and accompanying text, and Fla. Stat. Ann. § 101.011(6) (1989); Ga. Code Ann. § 34A-1124 (Harrison Supp. 1988); Kan. Stat. Ann. §§ 25-213 (1986); Ind. Code Ann. § 3-8-2.5(e) (Burns Supp. 1991); Md. Ann. Code, art. 33, § 5-3(f) (1986); Minn. Stat. § 204B.36(2) (1988); N.C Gen. Stat. § 163-151(6)(e) (1987); Tex. Code Ann. § 172.112 (Vernon 1986); W. Va. Code § 3-6-5 (1978); Wis. Stat. § 8.17(3)(a) (1987-88).

state legislative races, a primary winner who faces no further opposition is seated. *See* HRS § 12-41(a); Haw. Const. art. III, § 4 (1991 Supp.). In other cases of runaway winners, the seat is not filled, but the winner or her party retain important powers to fill vacancies under state law. *See* HRS §§ 11-117, 11-118, 17-3, 17-4, 17-5. Taken together with the ban on write-ins, these provisions reinforce the primary mandate, and focus the November election on truly contested electoral contests.

c. Procedural Interests Underlying the Ban: Informing the Electorate, Promptly Qualifying the Candidates, and Eliminating Potential for Fraud.

By eliminating election day write-in nominations, Hawaii law seeks to secure, rather than inhibit, a free election.

i. The Interest in Informed Voting

By barring late-blooming campaigns, Hawaii's ban on write-in voting flushes candidates out into the political arena by a reasonable date, thus fostering the goal of informed voting. In so doing, Hawaii, for all practical purposes joins twenty-seven other States[14] that refuse to grant voters " 'free and unrestricted choice' " on election day (Pet. Br. 15).

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[14] *See* Ariz. Rev. Stat. Ann. § 16-312 (1984 & Supp. 1989); Ark. Stat. Ann. § 7-5-205 (Supp. 1989); Cal. Elec. Code § 7300 (West 1977 & Supp. 1990); Colo. Rev. Stat. § 1-4-1001 (1980 & Supp. 1989); Conn. Gen. Stat. § 9-373(a) (1989); Fla. Stat. Ann. § 99.061(3) (West 1982 & Supp. 1991); Ga. Code Ann. § 34A-915 (Harrison Supp. 1988); Idaho Code § 34-702A (Supp. 1989); Mass. Gen. Laws Ann. ch. 54, § 78A (West. 1991); Md. Elec.

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ii. The Interest in Preventing Vacancies

Hawaii's filing deadlines, and processes for pre-election disqualifications, as enforced by the write-in ban, also act to "prevent the occurrence of a situation where, after a candidate is elected, he [or she] is found not to possess the qualifications [for office]." *Hayes v. Gill*, 52 Haw. 251, 254, 472 P.2d 872, 875 (1973). Furthermore, the ban serves to speed the vote count, minimize the risks of recounts and eliminate challenges inherent with write-in voting.[15]

iii. The Interest in Combating Electoral Corruption.

Hawaii's ban on write-in voting is also a weapon against electoral corruption in general, and, in particular,

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Code § 4D-1 (Supp. 1989); Mo. Rev. Stat. § 115.453(4) (1986); Mont. Code Ann. § 13-10-211 (1989); Neb. Rev. Stat. § 32-428.10(2) (1989); N.M. Stat. Ann. § 1-12-19.1A (1985 & Supp. 1991); N.Y. Elec. Law § 6-154 (McKinney 1978 & Supp. 1992); N.C. Gen. Stat. § 163-123(a) (1987 & Supp. 1991); N.D. Cent. Code § 16.1-12-02.2 (Supp. 1991); Ohio Rev. Code Ann. § 3513.041 (Anderson 1988 & Supp. 1991); Or. Rev. Stat. § 249.007 (Supp. 1991); Tex. Elec. Code § 192.036 (Vernon 1986 & Supp. 1991); Utah Code Ann. § 20-7-20 (1984 & Supp. 1991); Wash. Rev. Code Ann. § 29.04.180 (1965 & Supp. 1991); Wis. Stat. §§ 8.16(2) & 8.185(2) (1986 & Supp. 1991).

[15] Even the briefest survey of modern day election litigation reveals a substantial number of cases in which elections are contested based upon the adequacy of write-in votes. *See, e.g., Weldon v. Sanders*, 99 N.M. 160, 655 P.2d 1004 (1982); *Pendleton v. District of Columbia Board*, 433 A.2d 1102 (1981); *Devine v. Wonderlich*, 268 N.W.2d 620 (Iowa 1978); *Strmaglia v. Jenkins*, 9 Ill. App. 3d 703, 292 N.E.2d 912 (1973).

the practice of vote buying. Thus, the ban at its most basic level "secure[s] secrecy of the ballot." *Holstein v. Young*, 10 Haw. 216, 223 (1896). Without write-ins, "abuse [i]s made unprofitable since the party worker c[an]not check to see whether the bribed vote ha[s] been delivered." L.E. Fredman, *The Australian Ballot: The Story of an American Reform* 47 (1968). *Cf. Patterson v. Hanley*, 136 Cal. 265, 68 P. 821, 823 (1902).

II. The Litigation Below.

Petitioner Alan Burdick filed the first of the two actions below against the Lieutenant Governor, and the Director of Elections, on August 21, 1986, to force Hawaii "to permit the casting and counting of write-in votes[.]" J.A. 33. The main reason for the suit was the filing by only one Republican candidate, John J. Medeiros, at the primary stage for state representative in the 19th District, a fact that, in effect, prevented any other candidate from receiving votes at the general election. *See* J.A. 32, 276. Burdick never made an effort to gather signatures to establish a new party, or nominate a candidate in the Democratic, Republican, or nonpartisan primary elections, although he admits it would have been "quite easy" to gather the signatures to nominate a candidate. (J.A. 171).

Instead, Burdick turned to the federal courts, alleging he wanted to vote in that race, "in both the primary and general elections, for a person who has not filed nominating papers and whose name will not be printed on the ballot." J.A. 32. He also stated an interest "in vot[ing] for other persons in other elections" "whose names are not, or may not be on the election ballot." *Id.* at 32-33. The district court entered summary judgment and injunctive relief for Burdick (*see* Pet. App. at 66-77), relying mainly on *Canaan v. Abdelnour*, 40 Cal. 3d 703, 710 P.2d 268, 221

Cal. Rptr. 468 (1985), a decision grounded in California law. The court of appeals entered a stay, J.A. 109, and, in 1988, vacated and remanded with instructions to abstain. *See Burdick v. Takushi*, 846 F.2d 547 (9th Cir. 1988), Pet. App. 61, 66.

On remand, the district court consolidated the first case with Burdick's second suit, filed May 17, 1988, directed to the 1988 election (*see* J.A. 142), and certified questions to the Hawaii Supreme Court, which found no basis in the state constitution or statutes on which to moot or limit the federal issue. Apparently relying on the reasoning in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), the state court held:

> Hawaii's election laws provide for easy access to the ballot by new, or minority, parties, and by nonpartisan candidates, However, they do require that the nomination process be followed, and they do attempt to make the process of casting and counting ballots an orderly one, where the opportunities for fraud are minimized.

Burdick v. Takushi, 70 Haw. 498, 499-500, 776 P.2d 824, 826 (1989), Pet. App. 54-55. Thus, the court ruled, "write-in votes are not possible in [Hawaii's] statutory framework." *Id.*

On May 10, 1990, the district court nonetheless again held that the Hawaii election code was unconstitutional on its face as the ban on write in voting "impermissibly infringes on plaintiff's federal constitutional rights" and "no compelling state interests exist to justify this intrusion." *Burdick v. Takushi*, 737 F. Supp. 582, 592 (D. Haw. 1990), Pet. App. 50-51.

Despite Hawaii's other electoral avenues, the court found that Hawaii imposed burdens that were "great," and "enormous," and that the write-in ban struck "at the heart of our democratic processes," permitting the State to "substitute its judgment as to what the voters want for

the voters' own judgment." *Id.* at 588, 593, Pet. App. 41, 50, 51. The court found that, in its view, the ban "stifles what may be serious, legitimate candidacy," and, invoking a freewheeling reference to " 'the principle that debate on public issues should be uninhibited, robust, and wide open,' " nullified the ban even as to races where candidates would be seated after the primary, reasoning that "the electorate [should] be exposed to increased debate and public discussion." *Id.* at 591, Pet. App. 47-48.

On March 1, 1991, the Ninth Circuit, on Respondents' timely appeals (J.A. 205-209) reversed, and, on June 28, 1991, in response to Burdick's petition for rehearing, reaffirmed its judgment in an amended opinion (*id.* 1-17). Judge Beezer's amended opinion for the court, joined by Judges Skopil and Fernandez, reached the merits and held that, while the right to vote is "fundamental," "Burdick does not have an unlimited right to vote for any particular candidate." *Burdick v. Takushi*, 937 F.2d 415, 419 (9th Cir. 1991), Pet. App. 10.

In so holding, the panel employed "the analytical process" identified in *Anderson v. Celebrezze*, 460 U.S. 780 1983), isolating, first, the burdens imposed by Hawaii law as a whole, and then comparing the interests backing the ban. 937 F.2d at 418-21, Pet. App. 9-14. Noting both the nonpartisan and party petition methods of nomination, the panel found that the election laws "provide candidates with considerable ease of access to the ballot." *See* 937 F.2d at 419 & n.2, Pet. App. 11. The panel also held that the ban was "a content-neutral time, place, or manner restriction," *id.*, Pet. App. at 12, and "does not place any substantial burden on [Burdick's] fundamental right." Thus, "Burdick's asserted right to vote for *any* candidate he chooses does not implicate fundamental constitutional protections." *Id.* at 420, Pet. App. at 12.

The panel found that Hawaii's interests also justified the ban. Thus, the ban "ensur[ed] that unrestrained factionalism does not damage the election process," and discouraged "party raiding" at the primary. *Id.*, Pet. App. at 13. The court noted that the ban fostered, an informed electorate, "protect[ed] the primary mandate," and served to "eliminate frivolous candidacies." *Id.* at 420-21, Pet. App. at 14, 15.

The panel observed that its holding was in conflict with the Fourth Circuit's in *Dixon v. Maryland State Board*, 878 F.2d 776 (4th Cir. 1989), where the court struck down Maryland's system of filing fees for individuals seeking to become "official" write-in candidates. The *Dixon* court had quite apparently overlooked the significance of Maryland's indigency waiver for the filing fee, and therefore failed to examine Maryland law "as a whole." Moreover, with respect to the issues in this case, the Fourth Circuit took the position that even a write-in vote "for Donald Duck" "might, under appropriate circumstances, be meant as serious satirical criticism of the powers that be," *see* 878 F.2d at 785 n.12, and that any restriction on reporting write-in votes "eliminates [the voter's] freedom to choose as he wishes." *Id.* at 785 n.13. This conflict in reasoning between the judgments here and *Dixon* formed the principal basis for Mr. Burdick's petition for certiorari. *See* Pet. for Cert. at 9-14, No. 91-535.[16]

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[16] Respondents essentially conceded at the Petition stage that *Dixon* conflicts, in approach, with the judgment below, and with those of the Sixth, Seventh, Eighth, and Tenth Circuits, as well as of the highest courts of California, and New York, which reject, in holding, or principle, the notion that unlimited write-in voting is federally required. *See* Op. Cert. at 26-28 (citing *Zielasko v. Ohio*, 873 F.2d 957, 961 (6th Cir. 1989); *McClain v. Meier*, 851 F.2d 1045, 1051 (8th Cir. 1988); *Rainbow*

(Continued on following page)

SUMMARY OF ARGUMENT

Hawaii's system of printed ballots, in which voters, by petitions and a primary, have abundant opportunity to place the names of their preferred candidates on the ballot, is not only within constitutional limits, but reflects "a decision of the most fundamental sort for a sovereign entity." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2400 (1991). The federal district court erred in facially nullifying Hawaii's election law, and the Ninth Circuit's correction of that error should be affirmed.

To the degree Petitioner seeks relief that would mandate Hawaii to treat his write-in "expression" as a "vote," this case directly implicates the States' broad discretion to regulate ballot access. *See, e.g., Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). Petitioner's view of his claim as one of "voter's rights" does not oust Hawaii's power to regulate elections, *if* what is at stake is the right to "vote." Here, " 'rights of voters and the rights of candidates do not lend themselves to neat separation.' " *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983). The precise relief sought, a write-in *ballot*, does not as severely threaten ballot "crowding" as where *printed* ballot access is demanded. But this distinction is immaterial, because Hawaii does not rely on physical ballot crowding, *per se*, as the basis

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Coalition v. Oklahoma State Elections Board, 844 F.2d 740, 745 n.8 (10th Cir. 1988); *Hall v. Simcox*, 766 F.2d 1171, 1175 (7th Cir.), *cert. denied*, 474 U.S. 1006 (1985); *Legislature of California v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991); *Harden v. Board of Elections*, 74 N.Y.2d 796, 544 N.E.2d, 545 N.Y.S.2d 686 (1989)). Although Respondents urged this Court that the conflict with *Dixon* was not sufficient to warrant review, we welcome the opportunity to urge the Court to sustain the judgment below upholding Hawaii's election law.

for its ban on write-in voting. Rather, Hawaii relies on the opportunities elsewhere provided by law and compelling interests wholly independent of a desire to avoid physically long ballots. Above all, the difference between this case and those where litigants seek access to a *printed* ballot do not make this case in any other respect less of a "ballot access" case.

Seen in this light, Mr. Burdick's claim for a federal writ directing Hawaii to allow write-in votes without limit has no support in history, logic, or precedent. His argument that laws that in any way bar write-ins are unconstitutional even if a State is "extraordinarily liberal in granting candidates access to the ballot" (Pet. Br. at 31) places form over substance. If indulged by this Court, the claim would invalidate not only the laws of well over thirty States, but any system of primaries and runoffs that forces voters to choose among a discrete group of candidates. It would nullify, as well, the most routine filing deadline which, if not met, is enforced by a ban on votes for tardy candidates, and, even, candidate eligibility requirements which are a commonplace not only in the States, but in the Constitution itself. All such laws "leave some voters, at some time, without a candidate" (Pet. Br. 31), yet the States have long been permitted to enact laws that so structure their republican forms of government as "the people" desire. *See generally Storer v. Brown*, 415 U.S. 724, 730 (1974).

The Ninth Circuit properly weighed the burdens and justifications for Hawaii's write-in ban. The ban's limit on voter choice is not severe in light of Hawaii's alternatives for nominating candidates. *See Norman v. Reed*, 112 S. Ct. 698 (1992); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); *cf. Storer v. Brown*, 415 U.S. 724 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971); *Williams v. Rhodes*, 393 U.S. 23 (1968). As Hawaii, in effect, allows nomination to the

November ballot *both* by the April petition route *and* by the September primary, Hawaii clearly provides adequate access to the printed election ballot. That access overcomes any perceived need, in *other* election systems, for write-in voting as a remedy to otherwise burdensome election laws. *Cf. Williams v. Rhodes, supra.*

Hawaii's write-in ban serves numerous interests, long upheld as substantial and compelling. First, it enforces Hawaii's primary process, which is designed " 'to winnow out and finally reject all but the chosen candidates,' " *Munro*, 479 U.S. at 196, barring general election candidacies by those "whose juices are riled by the results of the primary." *Stevenson v. State Board of Elections*, 796 F.2d 1176, 1177 (7th Cir. 1986) (Easterbrook J., concurring). Second, it relieves constitutional pressure upon the open primary system, by accommodating legitimate desires to open party primary processes with the need to protect the parties' autonomy. *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 224 (1986). Third, it reinforces the primary mandate by eliminating genuinely uncontested races as of the close of the primary stage, *see Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982). Fourth, the ban forces a period of open competition among candidates, aiding informed voting, and permitting time to eliminate candidates who are not eligible to serve. *See Anderson v. Celebrezze*, 460 U.S. 780, 786, 788 n.9 (1983). Fifth, the ban ensures the vote is uncorrupted. *See United States v. Classic*, 313 U.S. 299 (1941).

The decision below was particularly appropriate in that Mr. Burdick made a purely facial challenge to Hawaii's law, requiring him to show that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *cf. Renne v. Geary*, 111 S. Ct. 2331 (1991) (dismissing, as unripe, First Amendment challenge to election law in absence of specific "intention to endorse any particular

candidate"). Indeed, Petitioner has effectively conceded that the write-in ban is facially valid, for he agrees the States may employ "reasonable" measures to eliminate classes of write-in votes, *see* Pet. Br. 31 n.22, and that States need not seat a candidate who wins a write-in plurality. *Id.* at 12. *See also* Pet. Br. at 38.

In fact, seen properly, this case is not about "voting" at all, but concerns the claim that the voting booth is a public forum in which voters not only may scrawl "electoral graffiti" over the printed ballot, but expect the State, at public expense, to tabulate and publish this "protest." The claim has no merit, *e.g., United States v. Kokinda*, 110 S. Ct. 3115 (1991); *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 793 (1985), and fails to comprehend that elections, at least in Hawaii, are "a vehicle only for putting candidates and laws to the electorate to vote up or down." *Georges v. Carney*, 691 F.2d 297, 301 (7th Cir. 1982) (Posner, J.).

ARGUMENT

I. The Ninth Circuit Properly Reversed the District Court's Wholesale Invalidation of Hawaii's Election Law; That Injunction Had, as a Federal Constitutional Matter, Usurped State Legislative Authority over the Electoral Process in Unprecedented Fashion.

In seeking to sustain an unlimited federal constitutional right to "dissent" by write-in vote from Hawaii's nomination processes, Petitioner distorts the minimal burdens Hawaii law imposes, and sweeps away, as insignificant, state interests long view as compelling. In so doing, Petitioner conflates several quite different strands

of First Amendment jurisprudence, and, improperly subordinates the States' vital interests in regulating electoral processes within their jurisdictions.

A. As the Court of Appeals Recognized, This Court's Principles Demand Deference to the States' Basic Decisions as to How to Structure Elections.

Decades ago, as the States debated ballot reform, this Court reaffirmed that the policy "which has prevailed from the foundation of the Government" was to "entrust[ ] the conduct of elections to state laws." *United States v. Gradwell*, 243 U.S. 476, 484 (1916).

Many State courts, during this period, interpreted state law to allow write-in voting. They relied on provisions for "free and open" elections,[17] other unique constitutional languages,[18] or ambiguities in state election statutes.[19]

Nothing in these rulings, of course, in any way limited the principles of federalism contemporaneously announced by this Court, and these principles, today, remain vital and require deference to Hawaii's decision to rely on a printed ballot in lieu of the option of write-in

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[17] *See Littlejohn v. People ex rel. Desch*, 52 Colo. 217, 121 P. 159, 162 (1912).

[18] *See, e.g., Mayor and Board of Alderman of City of Jackson v. State ex rel. Howie*, 102 Miss. 663, 59 So. 873, 875 (1912); *Barr v. Cardell*, 173 Iowa 18, 155 N.W. 312, 314-15 (1915); *Jackson v. Norris*, 173 Md. 579, 195 A. 576, 588 (1937).

[19] *See Canaan v. Abdelnour*, 40 Cal. 3d 703, 710 P.2d 268, 221 Cal. Rptr. 468 (1985) (and cases cited therein).

voting.[20] The issue in this case, of course, is thus not whether unlimited write-in voting is a good idea, but whether it is mandated not just by federal law,[21] but by a permanent demand of the Constitution.

This Court's present commitment to a generous deference to the States' role in the elections field cannot seriously be questioned. Indeed, this Court on many occasions has "rejected claims that the Constitution compels a fixed method of choosing state or local officers or representatives." *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982). Last Term, this Court reaffirmed the constitutional dimension of the States' choices with respect to "the structure of [their] government[s] and the character of those who exercise government authority." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2400 (1991). And only

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[20] A federal court cannot act on state law. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). Nor, a fortiori, could it bind Hawaii based on its view of "election common law." As it turns out, however, Hawaii's view of its laws was not necessarily inconsistent with that of mainland courts. *Compare Mayor and Board of Alderman of City of Jackson v. State ex rel. Howie*, 102 Miss. 663, 59 So. 873, 875 (1912) (write-in allowed; party primary was "exclusive" route to the ballot), *and Jackson v. Norris*, 173 Md. 579, 195 A. 576, 588 (1937) (write-in allowed; ballot access required enforcement of hundreds of voters pledging "to vote for the person"), *with McKenzie v. Boykin*, 111 Miss. 256, 71 So. 382, 384 (1916) (write-in rejected; names could be placed on ballot by petition signed "by only 15 qualified electors"), and *Jenson v. Turner*, 40 Haw. 604, 615 (1954) (write-in rejected; legislation allowed nominations by petition (25 signatures)). *See also Chamberlin v. Wood*, 15 S.D. 216, 88 N.W. 109 (1901) (upholding total ban).

[21] One significant ramification of a ruling in favor of Petitioner in this case is that it would preempt the Congressional role in elections. *See* U.S. Const. art. I, § 4.

recently, this Court again announced it would defer to the States' "sufficiently weighty" interests in regulating the ballot, upholding a petition signature requirement that exceeds Hawaii's most stringent petition avenues by more than a factor of five. *See Norman v. Reed*, 112 S. Ct. 698, 705, 708 (1992).

Likewise, in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), the Court held with "unmistakable clarity" that a State need not make "a particularized showing" of "some level of damage" to its political system "before the legislature could take corrective action" to forestall "voter confusion," "unrestrained factionalism at the general election," or similar evils. *Id.* at 195-96. The Court ruled that the States "should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Id.*

Moreover, wholly apart from deference due to the "state-federal balance," this Court has also agreed that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

While advocating that the Constitution, so far as the write-in voter is concerned, prohibits virtually any regulation of "the democratic process," Petitioner readily concedes that "under this Court's jurisprudence respecting rights of electoral participation, the Court has often been quite deferential in its review of state laws that regulate access to the ballot." Pet. Reply to Op. Cert. at 1, No. 91-535 (U.S. Nov. 25, 1991).

This recognition, however, involves little more than lip service. Seeking somehow to unhinge the "right to

vote" from "ballot access," Petitioner argues "[t]his is not a ballot access case" (Pet. Br. at 13), and, from there argues that the ban on write-in voting "burdens both the participatory and expressive aspects of voting" (*id.* at 19), and is not properly related "to the advancement of any of its proffered justifications" (*id.* at 39-40). Nothing in Petitioner's Brief, or elsewhere, however, diminishes the force of this Court's rulings that support Hawaii's reliance on the printed ballot.

B. The Court of Appeals Properly Treated this Case as One Implicating the Generous Deference Owed to the States as to the Decision How to Structure Access to the Ballot.

As we urged below, if Petitioner was serious in his claim that the Constitution compelled Hawaii to allow write-in *voting*, then this case properly was resolved under the generous standards applicable to a State's decision how best to structure ballot access. Those standards, at least as a general matter, put the issue as whether state laws "freeze the political status quo," *Jenness v. Fortson*, 403 U.S. 431, 438 (1971), such that it is "virtually impossible," *Williams v. Rhodes*, 393 U.S. 23, 24 (1968), for dissident votes to be counted. *See Munro*, 479 U.S. at 199 ("candidate access to a statewide ballot," even at the primary stage, is sufficient); *Storer*, 415 U.S. at 742 (issue is whether "reasonably diligent" candidate, in petition state, can make November ballot by the petition process).

Recognizing the "strategic interest" (*see* Pet. Reply to Op. Cert. at 1), in posturing this case outside the framework of deference established by these decisions, Petitioner claims vehemently that "this is not a case about Hawaii's ballot access laws" (Pet. Br. at 31), justifying the entirety of this argument on the fact that Mr. Burdick

does not want any particular candidate's name to "appear on the ballot" (*id.* at 28).

The Court of Appeals rejected this feigned distinction between "ballot access" and "voters' rights," observing that "[t]he right to vote is inexorably intertwined with the State's right to regulate the election process." Pet. App. at 11. It did so with good reason. For what makes this case at all important beyond the issue of whether Hawaii must conduct an advisory public opinion poll on election day (*see infra* pp. 47-49), is Petitioner's claim that he is being denied the *vote*. And, what makes, to use Petitioner's term, an act of "expression, commitment and choice" (Pet. Br. 11) a "vote," instead of a mere "protest," is the capacity of that act, if joined by sufficient similarly-minded actions by fellow citizens, to effect a legal transfer of power. It is this binding legal effect of the vote that makes it a right "preservative of all other rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1896). The " 'rights of voters and the rights of candidates do not lend themselves to neat separation,' " *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983), and while Petitioner may not want a printed ballot, and arguments in support of the write-in ban cannot rest as centrally on the problem of physical "ballot overcrowding,"[22] Petitioner is still seeking "ballot access," and the general deference deployed in ballot access cases applies.

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[22] As the record demonstrates, integration of write-in voting with Hawaii's computer punchcard voting methods (see J.A. 68-73 for representative ballot cards for each of the four counties in Hawaii), does require a not insignificant expansion of the ballot, as well as the need for detailed instructions, to voters, and election officials, concerning "how specifically write-in votes must be case, and how disputes about the validity and legibility of write-in votes are to be resolved." Aff. of Dwayne Yoshina dated Oct. 3, 1986, reprinted at J.A. 66.

In sum, unless Petitioner may be deemed to have waived any claim beyond the asserted right to cast a legally ineffective "write-in protest" at the ballot box,[23] the linkage between candidates and voters applies no less here, and justifies what Petitioner concedes is the "quite deferential" review this Court has granted to State "[r]estrictions upon the access of political parties [and candidates] to the ballot." *See, e.g., Munro*, 479 U.S. at 193.

C. The Court of Appeals Properly Held that Hawaii's Ban on Write-in Voting, When Viewed in the Context of the Electoral System as a Whole, Imposes only Minimal Burdens on Petitioner's Opportunity to Exercise a Meaningful and Effective Vote.

Petitioner's central thrust is that the write-in voting ban not only "stifle[s]" his exercise of the franchise, but

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[23] Because Petitioner "does not suggest that the state is obligated to permit a write-in candidate to serve in an office for which he or she is not qualified under state law" (Pet. Br. at 12), Petitioner's whole case in this Court could – and should – be interpreted to have abandoned any prayer for a true "write-in vote" injunction of the type entered by the District Court. This is so because, as presently constituted, State law would not recognize *any* write-in candidate as "qualified under state law" to hold office, in that surviving the nomination and election process, as it is now written, is a "qualification under state law" to hold any elective office. Under these circumstances, the Court certainly could – and should – deem the issue of write-in voting to have been mooted by Petitioner's own concessions. *See Deakins v. Monoghan*, 484 U.S. 193 (1988). Nonetheless, Respondents' arguments on this front go well beyond this waiver contention, in light of the importance that this Court be fully informed of the reasons not to grant a write-in voting remedy. See also the merits arguments contained in the Brief of the Amici States at 6-29.

renders his vote "forced," "debase[d]," "unacceptable," "utterly meaningless," and "ineffective." Pet. Br. at 9, 11, 19, 21.

These characterizations of the fact that no one in the Democratic party saw fit to run in the 1986 primary for the nineteenth state house district, and that Mr. Burdick did not bother himself to gather fifteen signatures prior to the close of the filing period in late July, aptly reveal the factual exaggeration underlying Petitioner's whole case.

At an even deeper level, they fundamentally misconceive the sorts of burdens on First Amendment interests this Court has found to be severe, and thus meriting of heightened scrutiny. *Cf. Norman v. Reed*, 112 S. Ct. at 705. Petitioner's conjuring of "serious burdens" out of the Hawaii election scheme, even though that system actually grants broad access, and, for purposes of Petitioner's case, may be assumed to grant virtually unlimited access to a printed ballot (*see* Pet. Br. at 30-31), is unsupported by precedent or sound principles.

1. The Ninth Circuit Properly Held that Hawaii's Ballot Access Laws Provide Broad Opportunity, and Impose only Minimal Burdens on First Amendment Interests.

Other than in a single footnote conclusorily disparaging two features of Hawaii's election code – the primary vote trigger for nonpartisans to advance to the general election, and the April deadline for "new party" petitions – Petitioner advances no specific challenge to the breadth of Hawaii's provisions for placing names on the printed ballot in advance of the primary and general election. *See* Pet. Br. at 30-31 & n.21. Indeed, Petitioner, for purposes of this case, concedes that the pre-election access provided by Hawaii law is virtually unlimited. Thus, "Hawai

could not escape the issues raised by this case even if it were extraordinarily liberal in granting candidates access to the ballot." *Id.* at 31. This is how Petitioner treated his claim below,[24] and it is this Court's prerogative to "deal with the case as it came here." *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86 (1988).

This course is well warranted, for Hawaii's law "has not substantially burdened the 'availability of political opportunity.' " *Munro v. Socialist Workers Party*, 479 U.S. at 199.

First, as the court below wrote persuasively in 1989:

> [T]he effect on a candidate's [and his supporters'] constitutional rights is "slight" when a state [as has Hawaii] affords a candidate easy access to the primary election ballot and the opportunity to wage a ballot-connected campaign. *Munro*, 479 U.S. at 199. Here, Erum had only to submit a petition signed by fifteen eligible voters to gain access to the primary ballot. This certainly qualifies as "easy access." Therefore, in light of *Munro*, the burden the Hawaii statutory scheme imposes on Erum's constitutional rights is "slight."

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[24] As Petitioner stated candidly at his deposition:

> Q. And so it would be your position that if a state provided unlimited rights in candidates to have their names printed on the ballot, that notwithstanding that unlimited access or right in a candidate to have their name printed on the ballot, that a voter, such as yourself, would have the unlimited right under the United States Constitution to cast a write-in vote for someone's name who is not on the printed ballot either at the primary or at the general election?
>
> A. That is correct. . . . .

Dep. of Alan Burdick at 27 (D. Haw. Aug. 26, 1988) (J.A. 172).

Erum v. Cayetano, 881 F.2d 689, 692-93 (9th Cir. 1989). The panel in this case followed suit, pointing to the "easy access" "to the primary ballot." 937 F.2d 419 n.2, Pet. App. 11.

Even holding aside Hawaii's petition route, *Munro* fully supports the view that any burden imposed by the write-in ban was, in effect, "slight." As this Court reasoned in *Munro*, that the State has chosen to regulate the nomination process through a primary *election* "is a significant difference," in that, compared to petition routes, a primary election hurdle is "a vehicle by which minor-party candidates [and independents] must demonstrate support that serves to promote the very First Amendment values that are threatened by overly burdensome ballot access restrictions." Thus, when a State offers "easy access to the primary election ballot and the opportunity to wage a ballot-connected campaign," any burden "is slight when compared to" that of laws in petition States. *Id.* at 199.

Neither Petitioner, nor the district court rulings in his favor, have ever had any good answer to this. Indeed, nothing in *Munro*, or in its underlying logic, suggests that Hawaii's non-partisan nomination process should be treated any differently than Washington's blanket primary system.[25] As this Court stressed in *Munro*, "[s]tates

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[25] While HRS § 12-41 can require a nonpartisan to obtain ten percent of the primary vote, the "least favored party provision" assures that the non-partisan need compete only against the winning party candidate with the least support. The election statistics show, for example, that, due to traditionally greater turnout in the Democratic primary, Republican candidates set the "least favored party" benchmark at less than 10 per cent in 8 of the 26 races where nonpartisans ran between 1976-1986. *See* Exh. "F" at 14, C.R. 47, No. 86-0582 (D. Haw.

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are not burdened with a constitutional imperative to reduce voter apathy or to "handicap" an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot." *See* 479 U.S. at 189. Indeed, petitioner presented no proof that obstacles facing nonpartisans were "insuperable" (*see Munro*, 479 U.S. at 193). Under summary judgment precepts, *see, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Ninth Circuit was correct in ruling for Respondents.[26]

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Apr. 19, 1990). New and minor parties, *see supra* note 5, have also driven down the number required. Of twenty-six nonpartisans who sought nomination between 1976 to 1986 – even before the Libertarian Party became an established party – only three were required to face the 10 percent requirement. In fourteen cases, nonpartisans were required to obtain less than 1 per cent of the primary vote. In only 5 cases were non-partisans required to obtain more than 5 per cent. *See* Exh. "F," *supra*.

Moreover, the public record shows that anywhere from 30-45 % of registered voters do not vote in the primary. *See* Office of the Lt. Gov. of Hawaii, *Results of Votes Cast: Primary Election, Sept. 17, 1988* at 11 (1988) (65.7% primary turnout); Office of the Lt. Gov. of Hawaii, *Results of Votes Cast: Primary Election, Sept. 20, 1986* at 11 (1986) (70.6% primary turnout); Office of the Lt. Gov. of Hawaii, *Results of Votes Cast: Primary Election, Sept. 22, 1984* at 11 (55.6% primary turnout). On the one hand, this means that the non-partisan's numerical goal – even if the "least favored party" rule is not in play – is substantially less than 10 per cent of the registered vote. *Compare Norman v. Reed*, 112 S. Ct. at 705 (noting requirement of 5% of registered voters). On the other, there is a large number of voters apparently uncommitted to a party and thus "up for grabs."

[26] Petitioner notes that Hawaii does not permit crossover voting between a party primary and the non-partisan primary, but the effects of this cut both ways, since less popular non-partisans can ride the "coattails" of more popular independent candidates and, likewise, share collectively in a voter "revolt" in any particular race from voting in the party primaries.

Second, unlike in Washington, Hawaii's September primary is not the only gateway to the November election. Unlike numerous States, Hawaii does not confine voters to a "single nominating act." *See American Party of Texas v. White*, 415 U.S. 767, 785 n.17 (1974). Thus, new and minor party candidates *and* independents[27] may "campaign among the entire pool of registered voters" not once, but twice. *Cf. Munro*, 479 U.S. at 197. Voters may sign any number of party petitions, and still vote for anyone on the primary election ballot. Similarly, Hawaii's signature requirement is "relatively lenient," *Williams v. Rhodes*, 393 U.S. at 33 n.9; *see Norman v. Reed*, 112 S. Ct. at 705, and, although Hawaii does have a late April filing deadline for the petitions,[28] there is no restrictive period

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[27] Although "*Storer* held that California's method of establishing new parties is not equivalent to or a good substitute for an independent candidacy," "things are different [here.]" *Stevenson v. State Board*, 794 F.2d 1176, 1179 (7th Cir. 1986) (Easterbrook, J.). As noted, *supra* p. 5, a "new party" needs no committees, officers, rules, or other trappings of party organization, a point underscored by Respondents' consistent view to that effect, *see* entries at J.A. 6-9 (the briefs filed here and in *Erum, supra*). This Court should accept this view. *See Frisby v. Schultz*, 487 U.S. 474, 483 (1988); *City of Lakewood v. Plain Dealer Co.*, 486 U.S. 750, 770 n.11 (1988).

[28] The petition deadline falls ninety days before the filing deadline for candidates in late July, the intent being that any challenges to the petitions will be accurately and conclusively litigated before the time when candidates will have to commit to a party primary, or choose to run as a nonpartisan. *Compare American Party of Texas v. White*, 415 U.S. 767, 787 n.18 ("some cutoff period is necessary for the Secretary of State to verify the validity of signatures on the petitions, to print the ballots, and, if necessary, to litigate any challenges"), *with FDIC v. Mallen*, 486 U.S. 230, 243 (1988) (noting, in due process context, concern that "a decision . . . is not made with excessive haste"),

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prior to that for signature gathering.[29] Given the numerous third parties that have gained ballot status in Hawaii, the Ninth Circuit was more than correct in holding that "Hawaii puts few restrictions on a candidate's access to the ballot," and, hence, "the prohibition on write-in voting places only minimal restrictions on political speech." 937 F.2d at 419.

2. The Ninth Circuit's Judgment Properly Reflects the Conclusion that Write-in Voting is, so far as the Constitution is Concerned, at Most only a Remedy for Otherwise Unconstitutional Ballot Access Laws.

The Ninth Circuit's judgment properly recognized that, rather than exist as an absolute federal right, write-in voting has, at most, only been ordered as a remedy to election laws that *otherwise* were unconstitutional. This conclusion answered Petitioner's attack on Hawaii law. Indeed, as Petitioner argues, his challenge is based on the view that write-in voting is required no matter how "extraordinarily liberal" a State is in granting "access to the ballot" (Pet. Br. at 31).

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and Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981) (" '[p]ublic policy dictates that there be an end of litigation' "). Seen in this light, the deadline serves to increase electoral competition by offering new party candidates the option of "getting back in the game" as nonpartisans if their petition efforts fail.

[29] *Compare Mandel v. Bradley*, 432 U.S. 173, 177 (1977) (per curiam) (reversing and remanding for new findings in light of "unlimited period in which signatures may be gathered" prior to March 8 deadline); *American Party of Texas*, 415 U.S. at 778 (holding 120-day pre-election deadlines "neither unreasonable nor unduly burdensome" despite 55 day gathering period).

In *Williams v. Rhodes*, 393 U.S. 23 (1968), this Court affirmed a three judge court's entry of "relief" in favor of the Socialist Labor Party in the 1968 Presidential election in Ohio "to the extent of having the right, despite Ohio laws, to get the advantage of write-in ballots," *id.* at 34, but only after exhaustively detailing the severe provisions of Ohio law that made it "virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties," *id.*, at 24. As stated by the concurring judge below in *Rhodes*:

> The history of the limited participation of minority parties in the past, and the lack of any showing of an administrative burden or necessity is a clear indication that the denial of the right to write in the name of the candidate of one's choice, *when coupled with the effective denial of ballot position*, amounts to an intentional denial of the plaintiffs' constitutionally protected right to vote.

Socialist Labor Party v. Rhodes, 290 F. Supp. 983, 997 (S.D. Ohio) (Kinneary, J., concurring) (emphasis added), *aff'd in part and modified in part*, 393 U.S. 23 (1968). Needless to say, nothing even approaching these facts is presented here.[30]

In contrast to Petitioner and the Fourth Circuit, the other courts of appeals to have considered the issue here

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[30] Hawaii has a special statute dealing with nominations for President and Vice President which requires political parties eligible to place candidates on the general election ballot to designate the candidates of "the state and the national party" by the 60th day prior to the election. Other groups may place names on the presidential ballot by submission, at that time, of petitions containing the signatures of currently registered voters equal in number to 1 per cent of the Hawaii vote in the last Presidential election. *See* HRS § 11-113. This statute was nowhere seriously addressed by Petitioner below; nor does he do so here.

have persuasively cabined write-in voting as irrelevant to the validity of election laws, and not a right. Thus, so long as a State otherwise provides sufficient opportunity "the lack of write-in votes is as a practical matter, [not] a significant distinction." *Rainbow Coalition v. Oklahoma State Elections Board*, 844 F.2d 740, 745 n.8 (10th Cir. 1988). Even if a State is in "the danger zone" by reason of a 2% party petition requirement, "barring write-in votes" cannot "put the plaintiff over the hump; as a practical matter it is a trivial distinction." *Hall v. Simcox*, 766 F.2d 1171, 1175 (7th Cir.), *cert. denied*, 474 U.S. 1006 (1985); *see also McClain v. Meier*, 851 F.2d 1045, 1051 (8th Cir. 1988) (having found North Dakota's laws reasonable, the claim that State "refused to count write-in votes" "does not state a federal question").

Since *Rhodes*, write-in voting has held similar stature in this Court. In *Lubin v. Panish*, 415 U.S. 709 (1974), the Court held that write-in voting would not even serve as a remedy to California's impermissible mandatory filing fee system, since, given " 'the realities of the electoral process,' " a write-in candidacy is "dubious at best." *Id.* at 719 n.5; *see Anderson v. Celebrezze*, 460 U.S. at 799 n.26 (same). Rather than give reason to elevate write-in voting into an absolute right, such statements support Hawaii's reliance on a printed ballot.

In light of this history, it would be astonishing to hold that States could not compensate for denying write-in voting by printed "access." In fact, Petitioner's argument inverts this Court's application of the First Amendment to state election laws, punishing Hawaii for substituting the more powerful weapon of "a ballot

connected campaign" (*see Munro*) for the "dubious" tool of a write-in vote (*see Lubin*).[31]

While it is true that this Court has noted the existence of write-in voting when pointing out the positive features of other States' laws, *see, e.g., Storer v. Brown*, 415 U.S. 724, 736 n.7 (1974); *Jenness v. Fortson*, 403 U.S. 431, 438 (1971), this Court has never suggested write-in voting is a constitutional necessity. To the contrary, States are not under an "affirmative duty" to enact every feature of the laws this Court has upheld. *American Party of Texas*, 415 U.S. at 785 n.17. Just as Texas need not allow its voters "to move freely from one to the other method of nominating candidates," *id.*, Hawaii, which permits such mobility, need not have write-ins. Indeed, to require write-in voting no matter how liberal ballot access laws are is to belie any pretense that state election laws are governed by a "flexible analytical approach" (Pet. Br. 33) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

As shown in the next section, nowhere could this be more true than with respect to Petitioner's identification of the asserted burdens inflicted by Hawaii's limit on write-in voting.

3. Petitioner's Arguments Relating to the Burden of the Write-in Voting Ban, Many of Which Were Not Raised Below, Would Nullify Any Discretion in a State To Regulate Elections.

Rather than consider the effect of Hawaii's ban on write-in voting in the context of the electoral process as a

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[31] In *Munro* itself, this Court, in upholding Washington's blanket primary scheme, took no issue with the Ninth Circuit's view of Washington law as banning write-in votes for candidates eliminated at the primary. *See Socialist Workers Party v. Munro*, 765 F.2d 1417, 1419 (9th Cir. 1985); *Cf. Norman v. Reed*, 112 S. Ct. 698 (1992) (upholding Illinois 2% signature rule notwithstanding Illinois limitations on write-in voting).

whole, Petitioner identifies three "burdens" imposed by the law, which, in essence, reflect criticism of any degree of state regulation which limits voter choice on election day.[32] Although assertedly grounded in "constitutional principles" (Pet. Br. at 11), none of these criticisms withstands serious analysis.

Petitioner's first two attacks – that the ban denies him the right to cast a fully effective ballot (Pet. Br. at 19-23), and that the ban conditions the right to vote on waiver of the right not to speak (Pet. Br. at 23-25) – are answered by *Bullock v. Carter*, 405 U.S. 134 (1972). There, this Court noted that while "write-in votes are not permitted in primary elections" in Texas, "Texas does not place a condition on the exercise of the right to vote, nor does it quantitatively dilute votes that have been cast." *Id.* at 137. "Rather, the Texas system [only] creates barriers to candidate access," and, as a result, simply "limit[s] the field of candidates from which the voters might choose." *Id.* at 143. Petitioner's third argument, that Hawaii impermissibly favors "certain speakers because of the content of their speech" (Pet. Br. 26), is disposed of by the straightforward language of the court below: "The prohibition on write-in voting is not based on the content or subject matter of a write-in vote but rather is applicable to all write-in votes and, thus, is a content-neutral time, place, or manner restriction." 937 F.2d at 419, Pet. App. at 12. At a more basic level, Petitioner's claims rest on a flawed view both of the right to vote, and of the Hawaii electoral system.

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[32] Petitioner's claims that the ban inflicts "enforced" speech (Pet. Br. at 23-25), or constitutes content regulation (*id.* at 25-32), were not raised below, let alone preserved in the court of appeals, and should not even be considered. *See, e.g., Delta Airlines v. August*, 450 U.S. 346, 362 (1981).

First, Petitioner's "debasement" argument wrongly seeks to conjure out of this Court's "one person, one vote" decisions the notion that there can be no equally applied limits on election day choice at all. *See* Pet. Br. at 20-23 (quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964), and *Board of Estimate v. Morris*, 489 U.S. 688 (1989)). Such logic ignores the fundamental proposition that " 'the right to vote, per se, is not a constitutionally protected right,' " and that the Constitution does not compel "a fixed method of choosing state or local officers or representatives." *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982). Indeed, Petitioner ultimately concedes that the States need not seat any of a variety of potential candidates, and that he may not (at least not really) "vote" for these ineligible persons. He thus appears to agree, as he must, that eligibility requirements, from New Hampshire's residence requirements, *see Chimento v. Stark*, 353 F. Supp. 1211 (D.N.H.), *aff'd*, 414 U.S. 802 (1973), to Arizona's "resign-to-run" law, *see Joyner v. Moffard*, 706 F.2d 1523 (9th Cir. 1983), are lawful. Nor does Petitioner seriously dispute that the States can condition the right to "vote," upon candidate compliance with "reasonable procedural demands imposed directly by the election code. *See* Pet. Br. at 31 n.22. All these regulations – which are genuinely reflected in Hawaii's election code as well – might in some sense "debase" the franchise, but it is not in any way that this Court's decisions now – or ought to – recognize as a "serious burden." No one disputes that voting rights are important, and that they must be distributed equally. *See Morris*, 489 U.S. at 693. But that truism does not make any of the neutral requirements of Hawaii law, which are each enforced through the ban, unconstitutional.

Second, Petitioner's "compelled speech" argument is just wrong factually. Hawaii does not in any way compel Mr. Burdick to vote for anyone, and, if he chooses not to support any of the candidates on the ballot, he is able to cast a "blank

vote," which will be duly recorded as such. *See* J.A. 215-284. Such abstentions cannot prevent a single candidate listed on the ballot from taking office, but, as the Common Cause Hawaii brief shows, the "blank vote" count plainly sends a message about the strength of a winning candidate's mandate. *See* Common Cause Hawaii Brief at 3. Moreover, nothing in the Hawaii electoral system is remotely coercive in the sense used by this Court in such cases as *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Wooley v. Maynard*, 430 U.S. 705 (1977); or *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). To put his favorite candidate(s) on the ballot, Mr. Burdick does not need to risk his job, abandon his car, or salute the flag. All he needs is a Saturday afternoon in which to gather fifteen or, if necessary, twenty-five petition signatures. "Hard work and sacrifice" "are the lifeblood of any political organization." *See American Party of Texas*, 415 U.S. at 787. This is true even for an organization of one. It literally stands the First Amendment on its head to say that the task of "petitioning for redress" is coercion, and Petitioner's argument here must fail.

Third, Petitioner's argument that the write-in ban breaches the "neutrality" principle underlying the First Amendment, is equally misplaced. Whatever may be the case in other States, in Hawaii the election booth is not "a government sponsored forum in which every voter had an unrestrained" "right" "to express his electoral preferences." *See Georges v. Carney*, 691 F.2d 297 (7th Cir. 1982). As Hawaii courts have long held, "[t]he privilege to 'write-in' a ballot would radically change both the primary and election laws." *Jenson v. Turner*, 40 Haw. 604, 613 (1954). Certainly if Hawaii allowed write-in votes for Republicans but not for the Green Party, that would raise a serious federal question. But Hawaii does not discriminate against write-in voters "on the basis of the content of [their] message." Pet. Br. at 29. Rather, if Hawaii discriminates at all, it is only because voters and

their candidates have missed a deadline, or their message has been rejected in the political marketplace. As the Ninth Circuit observed, that is not content-based regulation.

D. Under any Standard Applicable to Hawaii's Election Laws, Hawaii's Prohibition on Write-in Voting is Appropriately Backed by Long-Recognized Compelling Interests.

Hawaii's ban on write-in voting is backed by compelling state interests that suffice under any level of scrutiny.[33]

1. The Interest in Protecting the Electoral Process from Unrestrained Factionalism and Frivolous Candidacies at the General Election.

Hawaii's write-in ban serves, above all, to make the primary count, "avoid[ing] the possibility of unrestrained factionalism at the general election." *Munro*, 479 U.S. at 196. Petitioner concedes eliminating write-ins for those defeated at the primary is legitimate (*see* Pet. Br. 38), but decries going further. In Petitioner's view, a primary may "winnow out and finally reject all but the chosen candidates" except write-in candidates not beaten in the primary. *Cf.* 479 U.S. at 196.

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[33] Heightened scrutiny is inapt on any theory that Hawaii has engaged in the regulation of a party structure. *Tashjian v. Republican Party*, 479 U.S 208 (1986); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989). Mr. Burdick has no standing to speak for any party. *See Bender v. Williamsport Area School District*, 475 U.S. 534, 542-45 (1986). Likewise, this case has nothing to do with the laying of money penalties on speech based on its content. *See Simon & Schuster v. New York Victims Board*, 112 S. Ct. 501 (1991).

Petitioner's view is wrong for the simple reason that those "whose juices are riled by the results of the primary" include far more than the losing candidates. *Stevenson v. State Board*, 794 F.2d 1176, 1177 (7th Cir. 1986) (concurring op.). Disappointed staff, friends, supporters, and others interested in a campaign are all subject to the urge, if they dislike the primary winner, to seek a rematch in the general election. The State's interest in limiting intra-party feuding in the general election thus extends to those who "did not run in a primary election but [were] dismayed [by the result]." *Id.* at 1178.

The interest in avoiding "unrestrained factionalism" is "not only permissible, but compelling"[34] and "outweigh[s] the interest the candidate and his supporters may have in making a late rather than an early decision." *Storer*, 415 U.S. at 736. Moreover, a State need not "choose ineffectual means to achieve its aims." *Id.* Hawaii has no "burden of demonstrating empirically the objective effects on political stability" of general election write-ins. *Munro*, 479 U.S. at 195-98. Likewise, Hawaii can "raise the ante" for the general election by forcing candidates to show significant support. *Id.* at 196. It has an interest in permitting a "winner in the general election [to enter office] with sufficient support to govern effectively," *Storer*, 415 U.S. at 734. Vindicating all these interests as Hawaii has done is "precisely what [this Court] ha[s] held States are permitted to do." *Munro*, 479 U.S. at 198. The general election write-in ban is plainly valid.

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[34] There are elections with no primary, notably for Education Board and Office of Hawaiian Affairs. These are extremely crowded races. *See, e.g.*, J.A. 236, 237. A "sore loser" ban is inapt here, but other reasons, such as eliminating confusion, promoting voter education, barring frivolous candidates, and similar goals justify the ban in those situations.

2. The Interest in Protecting the Political Parties from Party Raiding.

At the primary stage, Hawaii's ban on write-in voting is closely tailored to eliminating "party raiding." *See Tashjian*, 479 U.S. at 219. Contrary to Petitioner, Hawaii is not estopped to claim the interest in preventing party raiding because we are an "open primary" State (Pet. Br. at 219). Indeed, it is precisely because we are an "open primary" State that the need for adequate protections against raiding is highly salient.

Hawaii's "open primary," *see* Haw. Const. art. II, § 4 (1978), is important to the State, but so is administering a primary that deflects claims, by the parties, of state sponsored infringements of their own associational rights. Under Hawaii law, the checks in the system are the statutory provisions that require party candidates to be "members of the party" and which allow challenges to these statements of membership. *See* HRS §§ 12-3(7) and 12-8. The effectiveness of these laws is greatly reduced by primary write-ins, for those laws are unworkable if a candidate does not file. The ban, at the primary stage, is "narrowly tailored," as Hawaii's interest in its open primary law consistent with party autonomy " 'would be achieved less effectively' " without the rule. *Ward v. Rock Against Racism*, 491 U.S. 781, 797 (1989). Burdick has no answer to this (*see* Pet. Br. 37) and affirmance is warranted.

3. The Interest in Protecting the Political Primary Mandate and in Eliminating Uncontested Elections.

States have a "compelling" interest in striking genuinely uncontested races from the ballot. *See Canaan v. Abdelnour*, 40 Cal. 3d 703, 726, 710 P.2d 268, 283, 221 Cal. Rptr. 468, 483 (1985). Indeed, if there is any election

where the Constitution would not require a "fixed method" of resolution, it would be one in which a candidate is not seriously opposed at all. *See Rodriquez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982).

Petitioner reluctantly concedes that Hawaii can seat run-away primary winners where candidates are "entitled by statute or constitutional provision to run unopposed," yet the mechanism, under state law, in effect applies to more than the state legislature and county offices. *Compare* Pet. Br. at 39 & n.28 with *supra* pp. 12-13. While in races for statewide and federal office a runaway primary winner is not "elected," the effect is practically the same. Only the rules of succession are somewhat different. *See* HRS §§ 11-117, 11-118. Any "reservations" one might advance over banning write-ins here are met by the fact that it is trivially easy to preempt a runaway primary winner. Hawaii should not be forbidden from enforcing its law because signatures of 15 or 25 persons cannot be had.

4. The Interest in Voter Education, Protecting Against Vacancies, and Enforcing Nomination Requirements.

Hawaii's procedural interest in flushing candidates into the open a reasonable time before the election is also compelling. "There can be no question about the legitimacy of the States' interest in fostering informed and educated expressions of the popular will." *Anderson*, 460 U.S. at 796. In diminishing "the right of the electorate to be fully informed as to whom is seeking office and what they stand for," *Gebelein v. Nashold*, 406 A.2d 279, 281 (Del. Ch. 1979), Petitioner turns the First Amendment upside down. In contrast to California's bans on endorsements, *See Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), Hawaii's law is tailored to

increase available information. Disclosure laws are not "paternalistic," but help to enforce, the State's " 'interest, if not a duty, to protect the integrity of its political processes.' " *Democratic Party v. Wisconsin*, 450 U.S. 107, 124 (1981). Indeed, even the Fourth Circuit has held that voters must "have time to study the candidates to guage their seriousness prior to the actual balloting." *Dixon v. Maryland State Board*, 878 F.2d 776, 784 (4th Cir. 1989).

Given the thirty States that regulate, often stringently, write-ins, Petitioner concedes Hawaii could "require persons seeking election as write-in candidates to register prior to the election," Pet. Br. at 31 n.22. In light of the broad claims he makes, and the opportunities he has, however, Mr. Burdick is in a poor position to claim that Hawaii law is overbroad by its substitution of "ballot-connected campaigns" for the write-in efforts allowed elsewhere only for candidates who file on time and meet minimum requirements. *See Storer*, 415 U.S. at 736-37.

Hawaii's procedural interests, however, go further. Like all States, Hawaii has minimum qualifications for its candidates, and, as Petitioner virtually admits, these have "only a negligible impact on the voters' right to have a meaningful choice of candidates." *Chimento v. Stark*, *supra*, 353 F. Supp. at 1216, 1217.[35] Hawaii plainly can see that those interests are vindicated before the election occurs, so that the risk is reduced of a vacancy or lengthy challenge caused by the "election" of an ineligible (or doubtfully eligible) candidate. On this front as well, the judgment below was well supported.

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[35] One ironic result of granting Petitioner's claim is that term-limits, intended to increase competition, would be void. *Compare Legislature v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991), *with* Brief of Common Cause/Hawaii at 3.

5. The Interest in Combating Fraud.

Last, but not least, Hawaii has a compelling interest in seeking that elections are free, not bought. Although this justification for the ban has existed from its inception, and was stressed by the Hawaii Supreme Court and Respondents below, Mr. Burdick says little in opposition to affirmance on this front, except to agree that elections should be "conducted fairly and honestly." Pet. Br. at 28. This Court, however, has clearly held that Hawaii is not encumbered with the burden of enduring "some level of damage" and can respond "with foresight." *Munro*, 479 U.S. at 195. Relaxing Hawaii's strong stand against corruption would increase the risk of fraud. That alone ends Plaintiff's claim. *Cf. Ward*, 491 U.S. at 798.

E. Affirmance is Particularly Appropriate in that the Court of Appeals was Faced With a Purely Facial Federal Challenge

Although the foregoing justifies the ban on write-in voting under any scenario, affirmance is even more warranted in light of the unusually broad manner in which Petitioner brings his case to this Court. At every step below, Petitioner made clear that his claim was that the write-in voting ban was void regardless of the facts underlying any application of the ban. His Brief here continues this tack. *See* Pet. Br. at 30-31.[36]

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[36] Even the argument with respect to the 1986 nineteenth state house district race is, in essence, a facial challenge, because Petitioner did not identify any particular candidate for whom he wished to cast a write-in vote, or take steps to nominate a candidate through lawful means. As such, his claim was, and remains, that Hawaii law is void regardless of the opportunities for printed access, or the state interests involved.

While the ban can be lawfully applied in all instances, as this case comes here the issue is whether the ban could be properly applied in *any* instance. A facial challenge, such as that here, "must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *accord, Stevenson v. State Board*, 794 F.2d 1176, 1181 (7th Cir. 1986) (Easterbrook, J., concurring) (overbreadth analysis does not apply to election law claims); *see also New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985). Given Petitioner's own arguments conceding the legitimacy of the write-in ban as applied to sore-losers, late bloomers, and other "ineligible" candidates, Petitioner cannot conceivably prevail under this test.[37]

II. Petitioner Cannot Obtain Reversal Upon a Public Forum Theory of "Freedom of Expression" in the Voting Booth, Unhinged from the Right to Cast a "Vote."

Petitioner's concession that he "does not suggest that the state is obligated to permit a write-in candidate to serve in an office for which he or she is not qualified under state law," Pet. Br. 12, strongly suggests, in the end,

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[37] Indeed, in light of *Renne v. Geary*, 111 S. Ct. 2331 (1991), the Ninth Circuit may have gone too far in even considering the merits of Petitioner's claims. Here, as in *Renne*, this Court "possesses no factual record of an actual or imminent application" of the law "sufficient to present the constitutional issues in 'clean-cut and concrete form.' " *Id.* at 2339. This is so because Petitioner has never identified any "candidate" for whom he desires to vote. This is true even with respect to the 1986 state house race mentioned in the complaint. Thus, to put the matter in Article III terms, this case may not be moot, but it is dubious whether it was ever ripe, since Petitioner never made a "particular endorsement" (*id.*) sufficient to allow his claim to be considered in the context of a concrete setting.

that his claim, now, is not about the right to vote at all, but is rather about the right to conscript the resources of the State for the purpose of publicizing protest speech. Whatever the scope of this claim,[38] which was not preserved below,[39] it is meritless.

The central defect in such "protest" relief is that it unhinges the right to "vote" from its status as a right to effect legal change in the political system. *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1896). The right to cast "protest votes" cannot be justified on the basis of the right to "vote" at all, but rather must find support in those First Amendment doctrines that require the State not just to tolerate, *see Texas v. Johnson*, 491 U.S. 397 (1989), but to subsidize, *see Rust v. Sullivan*, 111 S. Ct. 1759 (1991), criticism of the Government.

As the panel held, the ban on write-in voting "does not restrict the alternative channels available to Burdick for expressing his political views" and "is not based on the content or subject matter of a write-in vote." Moreover, the ban on write-in "protesting" is well justified on the compelling grounds of avoiding confusion in the voting booth, and conceptual overcrowding of the ballot with, in effect, a purely advisory question tacked onto every contest to pick an office holder. *Compare Ward*, 491 U.S. at 800, *with Munro*, 479 U.S. at 196.

Even more important, however, the issue of "narrow tailoring" applicable to time, place, and manner regulations of traditional public fora is not even implicated in a

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[38] *See supra* note 23.

[39] Petitioner presented no argument in the court of appeals requesting a less-intrusive right to cast a "protest" vote; moreover, such relief is suggested nowhere in the Petition.

State's decision to exclude "advisory speech" from the voting booth. As Judge Posner put it eloquently, at least unless a State chooses to do otherwise, the ballot is "not a vehicle for communicating messages; it is a vehicle only for putting candidates and laws to the electorate to vote up or down." *Georges v. Carney*, 691 F.2d 297, 301 (7th Cir. 1982).

Hawaii, of course, counts the votes of citizens for candidates who are on the ballot, whether or not they have any chance of winning.[40] These candidates, however, are on the "agenda," and thus speech for them is within "the purpose of the forum." *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 806 (1985). *Cf. Rust v. Sullivan*, 111 S. Ct. 1759, 1772, 1776-77 (1991). Petitioner's request to cast write-in "protests," however, seeks "to address a topic not encompassed within the purpose of the forum," and therefore may be rejected "based on [the] subject matter" of the proposed speech. *Cornelius*, 473 U.S. at 806. Hawaii's "allowance of some avenues of speech" is not "evidence that it is impermissibly suppressing other speech." *United States v. Kokinda*, 110 S. Ct. 3115, 3123 (1990) (pl. op.); *see id.* at 3126 (Kennedy, J., concurring in the judgment). Hawaii has no constitutional duty to allow write-in "protests."

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[40] Although Hawaii publishes all votes cast, under *Cornelius* a State has discretion to decide how to edit its vote reports.

CONCLUSION

For the foregoing reasons and those presented by the Amici States, the judgment of the court of appeals should be affirmed.

Dated: Honolulu, Hawaii, March 2, 1992.

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APPENDIX

APPENDIX "A"

Chapters 11, 12, 16, and 17, Hawaii Revised Statutes ("HRS") (1985 & Supp. 1991) (pertinent excerpts)

PART I. GENERAL PROVISIONS

§11-1 Definitions. Whenever used in this title, the words and phrases in this title shall, unless the same is inconsistent with the context, be construed as follows:

"Ballot," a ballot including an absentee ballot is a written or printed, or partly written and partly printed paper or papers containing the names of persons to be voted for, the office to be filled, and the questions or issues to be voted on. A ballot may consist of one or more cards or pieces of paper, or one face of a card or piece of paper, or a portion of the face of a card or piece of paper, depending on the number of offices, candidates to be elected thereto, questions or issues to be voted on, and the voting system in use. It shall also include the face of the mechanical voting machine when arranged with cardboard or other material within the ballot frames, containing the names of the candidates and questions to be voted on.

"Chief election officer," the lieutenant governor as set forth in section 11-2.

"Clerk," the county clerks of the respective counties.

"County," the counties of Hawaii, Maui, Kauai, and the city and county of Honolulu, as the context may require. For the purposes of this title, the county of Kalawao shall be deemed to be included in the county of Maui.

"Election," all elections, primary, special primary, general, special general, special, or county, unless otherwise specifically stated.

"Election officials," precinct officials and other persons designated as officials by the chief election officer.

"Hawaiian," any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.

"Office," an elective public office.

"Political party" or "party," a political party qualified under part V of this chapter.

"Precinct," the smallest political subdivision established by law.

"Primary," a preliminary election in which the voters nominate candidates for office as provided for in chapter 12.

"Service bureau" means a firm registered to do business in the State and whose principal business is furnishing data processing services.

"Special election," any single election required by law when not preceded by an election to nominate those candidates whose names appear on the special election ballot.

"Special primary election" and "special general election," elections held only (a) whenever any vacancy occurs in the offices of United States senator, United States representative, state senator, or state representative because of failure to elect a person at an uncontested general election or (b) as specified in county charters.

"Voter," any person duly registered to vote.

"Voting system," the use of paper ballots, electronic ballot cards, voting machines, or any system by which votes are cast and counted. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(a); am L 1979, c 196, §3; am L 1980, c 264, §1(a)] [am L 1987, c 232, §1; am L 1990, c 156, §4]

§11-2 Chief election officer. (a) The lieutenant governor shall be the chief election officer for the administration of this title. The lieutenant governor shall supervise all state elections. The chief election officer may delegate responsibilities in state elections within a county to the clerk of that county or to other specified persons.

(b) The chief election officer shall be responsible for the maximization of registration of eligible electors throughout the State. In maximizing registration the chief election officer shall make an effort to equalize registration between districts, with particular effort in those districts in which the chief election officer determines registration is lower than desirable. The chief election officer in carrying out this function may make surveys, carry on house to house canvassing, and assist or direct the clerk in any other area of registration.

(c) The chief election officer shall maintain data concerning registered voters, elections, apportionment, and districting. The chief election officer shall use this data to assist the reapportionment commission provided for under Article IV of the Constitution.

(d) The chief election officer shall be responsible for public education with respect to voter registration and information. [am L 1990, c 116, §2] [L 1970, c 26, pt of §2; am L 1979, c 51, §5; am imp L 1984, c 90, §1]

§11-3 Application of chapter. This chapter shall apply to all elections, primary, special primary, general, special general, special, or county, held in the State, under all voting systems used within the State, so far as applicable and not inconsistent herewith. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(b)]

§11-4 Rules and regulations. The chief election officer may make, amend, and repeat such rules and regulations governing elections held under this title, election procedures, and the selection, establishment, use, and operation of all voting systems now in use or to be adopted in the State, and all other similar matters relating thereto as in the chief election officer's judgment shall be necessary to carry out this title.

In making, amending, and repealing rules and regulations for voters who cannot vote at the polls in person and all other voters, the chief election officer shall provide for voting by such persons in such manner as to insure secrecy of the ballot and to preclude tampering with the ballots of these voters and other election frauds. Such rules and regulations, when adopted in conformity with chapter 91 and upon approval by the governor, shall have the force and effect of law. [L 1970, c 26, pt of §2; am imp L 1984, c 90, §1]

§11-5 Employees. The chief election officer may employ a permanent staff, subject to the provisions of chapters 76 and 77, to supervise state elections; maximize

registration of eligible voters throughout the State; maintain data concerning registered voters, elections, apportionment, and districting; and to perform other duties as prescribed by law. The chief election officer or county clerk may employ precinct officials and other election employees as the chief election officer or county clerk may find necessary, none of whom shall be subject to the provisions of chapters 76 and 77. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(c); am L 1977, c 199, §2; am imp L 1984, c 90, §1]

* * *

PART V. PARTIES

§11-61 "Political party" defined. (a) The term "political party" means any party which has qualified as a political party under sections 11-62 and 11-64 and has not been disqualified by this section. A political party shall be an association of voters united for the purpose of promoting a common political end or carrying out a particular line of political policy and which maintains a general organization throughout the State, including a regularly constituted central committee and county committees in each county other than Kalawao.

(b) Any party which does not meet the following requirements or the requirements set forth in sections 11-62 to 11-63, shall be subject to disqualification:

(1) A party must have had candidates running for election at the last general election for any of the offices listed in paragraphs (2) to (5) whose terms had expired. This does not include those offices which were vacant

because the incumbent had died or resigned before the end of the incumbent's term;

(2) The party received at least ten per cent of all votes cast for any of the offices voted upon by all the voters in the State;

(3) The party received at least ten per cent of all the votes cast in at least fifty per cent of the congressional districts;

(4) The party received at least ten per cent of all the votes cast in at least the six senatorial districts with the lowest votes cast for the office of state senator; or

(5) The party received at least ten per cent of all the votes cast in at least fifty per cent of the representative districts for the office of state representative. [L 1970, c 26, pt of §2; am L 1979, c 125, §3(1); am L 1983, c 34, §3; am L 1986, c 323, §1]

§11-62 Qualification of political parties; petition. (a) Any group of persons hereafter desiring to qualify as a political party for election ballot purposes in the State shall file with the chief election officer a petition as hereinafter provided. The petition for qualification as a political party shall:

(1) Be filed not later than 4:30 p.m. on the one hundred fiftieth day prior to the next primary;

(2) Declare as concisely as may be the intention of signers thereof to qualify as a statewide political party in the State and state the name of the new party;

(3) Contain the signatures of currently registered voters comprising not less than one per cent of the total registered voters of the State as of the last preceding general election;

(4) Be accompanied by the names and addresses of the officers of the central committee and of the respective county committees of the political party and by the party rules; and

(5) Be upon the form prescribed and provided by the chief election officer.

(b) The petition shall be subject to hearing under chapter 91, if any objections are raised by the chief election officer or any other political party. All objections shall be made not later than 4:30 p.m. on the tenth day after the petition has been filed. If no objections are raised by 4:30 p.m. on the tenth day, the petition shall be approved. If an objection is raised, a decision shall be rendered not later than 4:30 p.m. on the thirtieth day after filing of the petition or not later than 4:30 p.m. on the one hundredth day prior to the primary, whichever shall first occur.

(c) The chief election officer may check the names of any persons on the petition to see that they are registered voters and may check the validity of their signatures. The petition shall be public information upon filing.

(d) Each group of persons desiring to qualify as a political party shall qualify under this section for three general elections, after which the group shall be deemed a political party for the following ten-year period, provided that each party qualified under this section shall

continue to field candidates for public office during the ten year period following qualification. After each ten-year period, the party qualified under this section shall either remain qualified under the standards set forth in section 11-61, or requalify under this section 11-62. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(p); am L 1983, c 34, §4; am L 1986, c 323, §2]

§11-63 Party rules, amendments to be filed. All parties must file their rules with the chief election officer not later than 4:30 p.m. on the one hundred fiftieth day prior to the next primary. All amendments shall be filed with the chief election officer not later than 4:30 p.m. on the thirtieth day after their adoption. The rules and amendments shall be duly certified to by an authorized officer of the party and upon filing, the rules and amendments thereto shall be a public record. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(q); am L 1983, c 34, §5; am L 1986, c 323, §3]

* * *

§11-64 Names of party officers to be filed. All parties shall submit to the chief election officer and the respective county clerks not later than 4:30 p.m. on the ninetieth day prior to the next primary, a list of names and addresses of officers of the central committee and of the respective county committees. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(r); am L 1983, c 34, §6]

§11-65 Determination of party disqualification; notice of disqualification. Not later than 4:30 p.m. on the one hundred twentieth day after a general election, the chief election officer shall determine which parties were qualified to participate in the last general election, but

which have become disqualified to participate in the forthcoming elections. Notice of intention to disqualify shall be served by certified or registered mail on the chairman, any officer of the central committee of the party, as shown by the records of the chief election officer. In addition, notice of intention to disqualify shall also be given by publication in a newspaper of general circulation.

If an officer of the party whose name is on file with the chief election officer desires a hearing on the notice of intention to disqualify, the officer of the party shall, not later than 4:30 p.m. on the tenth day after service by mail or not later than 4:30 p.m. on the tenth day after the last day upon which the notice is published in any county, whichever is later, file an affidavit with the chief election officer setting forth facts showing the reasons why the party should not be disqualified. The chief election officer shall call a hearing not later than twenty days following receipt of the affidavit. The chief election officer shall notify by certified or registered mail the officer of the party who filed the affidavit of the date, time and place of the hearing. In addition, notice of the hearing shall be published in a newspaper of general circulation not later than five days prior to the day of the hearing. The chief election officer shall render the chief election officer's decision not later than 4:30 p.m. on the seventh day following the hearing. If the party does not file the affidavit within the time specified, the notice of intention to disqualify shall constitute final disqualification. A party thus disqualified shall have the right to requalify as a new party by following the procedures of section 11-62.

[L 1970, c 26, pt of §2; am L 1973, c 217, §1(5); am L 1977, c 189, §1(4); am imp L 1984, c 90, §1]

* * *

PART VIII. BALLOTS

§11-111 Official and facsimile ballots. Ballots issued by the chief election officer in state elections and by the clerk in county elections are official ballots. In elections using the paper ballot and electronic voting systems, the chief election officer or clerk in the case of county elections shall have printed informational posters containing facsimile ballots which depict the official ballots to be used in the election. The precinct officials shall post the informational posters containing the facsimiles of the official ballots near the entrance to the polling place where they may be easily seen by the voters prior to voting. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(ee); am L 1975, c 36, §1(4); am L 1980, c 264, §1(f)]

§11-112 Contents of ballot. (a) The ballot shall contain the names of the candidates, their party affiliation or nonpartisanship in partisan election contests, the offices for which they are running, and the district in which the election is being held. In multimember races the ballot shall state that the voter shall not vote for more than the number of seats available or the number of candidates listed where such number is less than the seats available.

(b) The ballot may include questions concerning proposed state constitutional amendments, proposed county charter amendments, or proposed initiative or referendum issues. When the legislature passes a bill to

submit a proposed constitutional amendment to the electorate, the bill shall contain the exact question that is to be printed on the ballot. The question shall be phrased to require a "yes" or "no" response by the voter.

(c) At the chief election officer's discretion, the ballot may have a background design imprinted onto it.

(d) When the electronic voting system is used, the ballot may have pre-punched codes and printed information which identify the voting districts, precincts, and ballot sets to facilitate the electronic data processing of these ballots.

(e) The name of the candidate may be printed with the Hawaiian or English equivalent or nickname, if the candidate so requests in writing at the time the candidate's nomination papers are filed. Candidates' names, including the Hawaiian or English equivalent or nickname, shall be set on one line.

(f) The ballot shall bear no word, motto, device, sign, or symbol other than allowed in this title. [L 1970, c 26, pt of §2; am L 1975, c 36, §1(5); am L 1977, c 189, §1(7); am L 1980, c 264, §1(g); am L 1983, c 34, §13; am L 1984, c 62, §1]

§11-113 Presidential ballots. (a) In presidential elections, the names of the candidates for president and vice president shall be used on the ballot in lieu of the names of the presidential electors, and the votes cast for president and vice president of each political party shall be counted for the presidential electors and alternates nominated by each political party.

(b) A "national party" as used in this section shall mean a party established and admitted to the ballot in at least one state other than Hawaii or one which is determined by the chief election officer to be making a bona fide effort to become a national party. If there is no national party or the national and state parties or factions in either the national or state party do not agree on the presidential and vice presidential candidates, the chief election officer may determine which candidates' names shall be placed on the ballot or may leave the candidates' names off the ballot completely.

(c) All candidates for president and vice president of the Untied States shall be qualified for inclusion on the general election ballot under either of the following procedures:

(1) In the case of candidates of political parties which have been qualified to place candidates on the primary and general election ballots, the appropriate official of those parties shall file a sworn application with the chief election officer not later than 4:30 p.m. on the sixtieth day prior to the general election, which shall include:

(A) The name and address of each of the two candidates;

(B) A statement that each candidate is legally qualified to serve under the provisions of the United States Constitution;

(C) A statement that the candidates are the duly chosen candidates of both

the state and the national party, giving the time, place, and manner of the selection.

(2) In the case of the candidates of parties or groups not qualified to place candidates on the primary or general election ballots, the person desiring to place the names on the general election ballot shall file with the chief election officer not later than 4:30 p.m. on the sixtieth day prior to the general election:

(A) A sworn application which shall include the information required under (1)(A) and (B) above, and (C) where applicable;

(B) A petition which shall be upon the form prescribed and provided by the chief election officer containing the signatures of currently registered voters which constitute not less than one per cent of the votes cast in the State at the last presidential election. The petition shall contain the names of the candidates, a statement that the persons signing intend to support those candidates, the address of each signatory, the date of the signer's signature and other information as determined by the chief election officer.

Prior to being issued the petition form, the person desiring to place the names on the general election ballot shall submit a notarized statement from each candidate of that person's intent to be a candidate for president or vice president of the United States

on the general election ballot in the State of Hawaii.

(d) Each applicant, and the candidates named, shall be notified in writing of the applicant's or candidate's eligibility or disqualification for placement on the ballot not later than 4:30 p.m. on the tenth day after filing or not later than 4:30 p.m. on the fiftieth day prior to the presidential election, whichever is less.

(e) If the applicant, or any other party, individual, or group with a candidate on the presidential ballot, objects to the finding of eligibility or disqualification the person may, not later than 4:30 p.m. on the fifth day after the finding, file a request in writing with the chief election officer for a hearing on the question. A hearing shall be called not later than 4:30 p.m. on the tenth day after the receipt of the request and shall be conducted in accord with chapter 91. A decision shall be issued not later than 4:30 p.m. on the fifth day after the conclusion of the hearing. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(ff); am L 1977, c 189, §1(8); am L 1983, c 34, §14]

§11-114 Order of offices on ballot. The order of offices on a ballot shall be arranged substantially as follows: first, president and vice president of the United States; next, United States senators; next, United States house of representatives; next, governor and lieutenant governor; next, state senators; next, state representatives; and next, county offices. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(gg); am L 1980, c 264, §1(h)]

§11-115 Arrangement of names on the ballot. The names of the candidates shall be placed upon the ballot for their respective offices in alphabetical order except as

provided in section 11-118 and the limitations of the voting system in use, and except for the case of the candidates for vice president and lieutenant governor in the general election whose names shall be placed immediately below the name of the candidate for president or governor of the same political party.

In elections using the paper ballot or electronic voting systems where the names of the candidates are printed and the voter records the voter's vote on the face of the ballot, the following format shall be used: A horizontal line shall be ruled between each candidate's name and the next name, except between the names of presidential and vice presidential candidates and candidates for governor and lieutenant governor of the same political party in the general election. In such case the horizontal line will follow the name of the candidates for vice president and lieutenant governor of the same political party, thereby grouping the candidates for president and vice president and governor and lieutenant governor of the same political party within the same pair of horizontal lines. Immediately after all the names, on the right side of the ballot, two vertical lines shall be ruled, so that in conjunction with the horizontal lines, a box shall be formed opposite each name and its equivalent, if any. In case of the candidates for president and vice president and governor and lieutenant governor of the same political party, only one box shall be formed opposite their set of names. The boxes shall be of sufficient size to give ample room in which to designate the choice of the voter in the manner prescribed for the voting system in use. All of the names upon a ballot shall be placed at a uniform distance from the left edge and close thereto, and shall be

of uniform size and print subject to section 11-119. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(hh); am L 1976, c 106, §1(8); am L 1977, c 189, §1(9); am imp L 1984, c 90, §1]

§11-116 Checking ballot form by candidates and parties. Facsimiles of all ballot layouts prior to printing shall be available for viewing by the candidates and the parties at the office of the chief election officer and the county clerk as soon after the close of filing as they are available. Such layout facsimiles shall show the type faces used, the spelling and placement of names, and other information on the ballot. [L 1970, c 26, pt of §2]

§11-117 Withdrawal of candidates; disqualification; death; notice. (a) Any candidate may withdraw not later than 4:30 p.m. on the day immediately following the close of filing for any reason and may withdraw after the close of filing up to 4:30 p.m. on the twentieth day prior to an election for reasons of ill health. When a candidate withdraws for ill health, the candidate shall give notice in writing to the chief election officer if the candidate was seeking a congressional or state office, or the candidate shall give notice in writing to the county clerk if the candidate was seeking a county office. The notice shall be accompanied by a statement from a licensed physician indicating that such ill health may endanger the candidate's life.

(b) On receipt of the notice of death, withdrawal, or upon determination of disqualification, the chief election officer or the clerk shall inform the chairperson of the political party of which the person deceased, withdrawing, or disqualified was a candidate. When a candidate

dies, withdraws, or is disqualified after the close of filing and the ballots have been printed, the chief election officer or the clerk may order the candidate's name stricken from the ballot or order that a notice of the death, withdrawal, or disqualification be prominently posted at the appropriate polling places on election day.

(c) In no case shall the filing fee be refunded after filing. [L 1970, c 26, pt of §2; am L 1972, c 77, §5; am L 1973, c 217, §1(ii); am L 1983, c 34, §15]

§11-118 Vacancies; new candidates; insertion of names on ballots. (a) In case of death, withdrawal, or disqualification of any party candidate after filing, the vacancy so caused may be filled by the party. The party shall be notified by the chief election officer or the clerk in the case of a county office immediately after the death, withdrawal, or disqualification.

(b) If the party fills the vacancy, and so notifies the chief election officer or clerk not later than 4:30 p.m. on the third day after the vacancy occurs, but not later than 4:30 p.m. on the fiftieth day prior to a primary or special primary election or not later than 4:30 p.m. on the fortieth day prior to a special, general, or special general election, the name of the replacement shall be printed in an available and appropriate place on the ballot, not necessarily in alphabetical order. If the party fails to fill the vacancy pursuant to this subsection, no candidate's name shall be printed on the ballot for the party for that race.

(c) If the ballots have been printed and it is not reasonably possible to insert an alternate's name, the chief election officer shall issue a proclamation informing

the public that the votes cast for the vacating candidate shall be counted and the results interpreted as follows:

(1) In a primary or special primary election:

(A) In partisan races, if, but for candidate's vacancy, the vacating candidate would have been nominated pursuant to section 12-41(a), a vacancy shall exist in the party's nomination, to be filled in accordance with subsection (b).

(B) In nonpartisan races, if, but for the candidate's vacancy, the vacating candidate would have qualified as a candidate for the general or special general election ballot pursuant to section 12-41(b), the nonpartisan candidate who received the next highest number of votes shall be placed on the ballot provided that the candidate also meets the requirements of section 12-41(b).

(2) In a special, general, or special general election, if, but for the candidate's vacancy, the vacating candidate would have been elected, a vacancy shall exist in the office for which the race in question was being held, to be filled in the manner provided by law for vacancies in office arising from the failure of an elected official to serve the official's full term because of death, withdrawal, or removal.

(3) In any other case where, but for the candidate's vacancy, the vacating candidate would have been deemed elected, a vacancy

shall exist in the office for which the candidate has filed, to be filled in the manner provided by law for vacancies in office arising from the failure of an elected official to serve the official's full term in office because of death, withdrawal, or removal.

(d) The parties shall adopt rules to comply with this provision, and those rules shall be submitted to the chief election officer.

(e) The chief election officer or county clerk in county elections may waive any or all of the foregoing requirements in special circumstances as provided in the rules adopted by the chief election officer. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(jj); am L 1980, c 247, §1; am L 1983, c 34, §16; am L 1986, c 305, §1; am L 1990, c 7, §3]

§11-119 Printing; quantity. (a) The ballots shall be printed by order of the chief election officer or the clerk in the case of county elections. In any state or county election the chief election officer on agreement with the clerk may consolidate the printing contracts for similar types of ballots where such consolidation will result in lower costs.

(b) Whenever the chief election officer is responsible for the printing of ballots, the exact wording to appear thereon, including, but not limited to, questions and issues shall be submitted to the chief election officer not later than 4:30 p.m. on the sixtieth calendar day prior to the applicable election.

(c) Based upon clarity and available space, the chief election officer or the clerk in the case of county elections shall determine the style and size of type to be used in

printing the ballots. The color, size, weight, shape, and thickness of the ballot shall be determined by the chief election officer.

(d) Each precinct shall receive a sufficient number of ballots based on the number of registered voters and the expected spoilage in the election concerned. A sufficient number of absentee ballots shall be delivered to each clerk not later than 4:30 p.m. on the fifteenth day prior to the date of any election. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(kk); am L 1975, c 36, §1(6); am L 1976, c 106, §1(9); am L 1979, c 133, §4; am L 1980, c 264, §1(i); am L 1985, c 203, §4]

§11-120 Distribution of ballots; record. The chief election officer or the county clerk in county elections shall forward the official ballots, specimen ballots, and other materials to the precinct officials of the various precincts. They shall be delivered and kept in a secure fashion in accordance with rules and regulations promulgated by the chief election officer. In no case shall they arrive later than the opening of the polls on election day.

A record of the number of ballots sent to each precinct shall be kept by the chief election officer or the clerk. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(ll)]

§11-131 Hours of voting. The polls shall be opened by the precinct officials at 7:00 a.m. of the election day and shall be kept open continuously until 6:00 p.m. of that day. If, at the closing hour of voting, any voter desiring to vote is standing in line outside the entrance of the polls with the desire of entering and voting, but due to the polling place being overcrowded has been unable to do so, the voter shall be allowed to vote irrespective of

the closing hour of voting. No voter shall be permitted to enter or join the line after the prescribed hour for closing the polls. If all of the registered voters of the precinct have cast their votes prior to the closing time, the polls may be closed earlier but the votes shall not be counted until after closing time unless allowed by the chief election officer. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(mm); am imp L 1984, c 90, §1]

§11-132. One thousand foot radius; admission within polling place. (a) The precinct officials shall post in a conspicuous place, prior to the opening of the polls, a map designating an area of one thousand feet in radius around the polling place. Any person who remains or loiters within an area of one thousand feet in radius around the polling place for the purpose of campaigning shall be guilty of a misdemeanor.

(b) Admission within the polling place shall be limited to the following:

(1) Election officials;

(2) Watchers, if any, pursuant to section 11-77;

(3) Candidates;

(4) Any voters actually engaged in voting, going to vote or returning from voting;

(5) Any person, designated by a voter who is physically disabled, while the person is assisting the voter; and

(6) Any person or nonvoter group authorized by the chief election officer or the clerk in county elections to observe the election at

designated precincts for educational purposes provided that they conduct themselves so that they do not interfere with the election process. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(nn); am L 1975, c 36, §1(7); am L 1980, c 264, §1(j); am imp L 1984, c 90, §1]

§11-133 Voting booths; placement of visual aids. The precinct officials shall provide sufficient voting booths within the polling place at or in which the voters may conveniently cast their ballots. The booths shall be so arranged that in casting the ballots the voters are screened from the observation of others.

Visual aids shall be posted at or in each voting booth and in conspicuous places outside the polling place before the opening of the polls. [L 1970, c 26, pt of §2; am L 1973, c 217, §(oo); am L 1975, c 36, §1(7A); am L 1981, c 100, §1(2)]

§11-134 Ballot transport containers; ballot boxes. (a) The seals of the ballot transport containers shall be broken and opened on election day only in the presence of at least two precinct officials not of the same political party.

(b) The chief election officer shall provide suitable ballot boxes for each polling place needed. They shall have a hinged lid fastened securely by a nonreusable seal. In the center of the lid there shall be an aperture of the appropriate size for the voting system used. The ballot boxes shall be placed at a point convenient for the deposit of ballots and where they can be observed by the precinct officials.

(c) At the opening of the polls for election, the chairperson of the precinct officials shall publicly open the ballot boxes and expose them to all persons present to show that they are empty. The ballot boxes shall be closed and sealed; they shall remain sealed until transported to the counting center; provided that, in precincts where the electronic voting system is used, the ballot boxes shall not be opened at the polling places except as provided by rules adopted pursuant to chapter 91. [L 1970, c 26, pt of §2; am L 1975, c 36, §1(8); am L 1980, c 264, §1(k); am L 1983, c 34, §17]

§11-135 Early collection of ballots. In an electronic ballot system election the chief election officer may authorize collection of voted ballots before the closing of the polls in order to facilitate the counting of ballots; provided that the voted ballots shall be returned to the counting center in sealed ballot boxes. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(pp); am L 1975, c 36, §1(9); am L 1980, c 264, §1(l); am L 1983, c 34, §18]

§11-136 Poll book identification, voting. Every person upon applying to vote shall sign the person's name in the poll book prepared for that purpose. This requirement may be waived by the chairman of the precinct officials if for reasons of illiteracy or blindness or other physical disability the voter is unable to write. Every person shall provide identification if so requested by a precinct official.

After signing the poll book and receiving the voter's ballot, the voter shall proceed to the voting booth to vote according to the voting system in use in the voter's precinct. The precinct official may, and upon request

shall, explain to the voter the mode of voting. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(qq); am imp L 1984, c 90, §1]

§11-137 Secrecy; removal or exhibition of ballot. No person shall look at or ask to see the contents of the ballot or the choice of party or nonpartisan ballot of any voter, except as provided in section 11-139, nor shall any person within the polling place attempt to influence a voter in regard to whom the voter shall vote for. When a voter is in the voting booth for the purpose of voting, no other person shall, except as provided in section 11-139, be allowed to enter the booth or to be in a position from which the person can observe how the voter votes.

No person shall take a ballot out of the polling place except as provided in sections 11-135 and 11-139. After voting the voter shall leave the voting booth and deliver the voter's ballot to the precinct official in charge of the ballot boxes. The precinct official shall make certain that the precinct official has received the correct ballot and no other and then shall deposit the ballot into the ballot box. No person shall look at or ask to see the contents of the unvoted ballots. If any person having received a ballot leaves the polling place without first delivering the ballot to the precinct official as provided above, or wilfully exhibits the person's ballot or the person's unvoted ballots in a special primary or primary election, except as provided in section 11-139, after the ballot has been marked, such person shall forfeit the person's right to vote, and the chairman of the precinct officials shall cause a record to be made of the proceeding. [L 1970, c 26, pt of §2; am L 1972, c 158, §1; am L 1973, c 217, §1(rr); am L

1975, c 36, §1(10); am L 1980, c 264, §1(m); am imp L 1984, c 90, §1]

§11-138 Time allowed voters. A voter shall be allowed to remain in the voting booth for five minutes, and having voted the voter shall at once emerge and leave the voting booth. If the voter refuses to leave when so requested by a majority of precinct officials after the lapse of five minutes, the voter shall be removed by the precinct officials. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(ss); am L 1980, c 264, §1(n); am imp L 1984, c 90, §1]

§11-139 Voting assistance. (a) Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or agent of the voter's union, or the voter may receive the assistance of two precinct officials who are not of the same political party. Before rendering assistance or permitting assistance to be rendered, the precinct officials shall be satisfied that the physical disability exists. If a voter with a physical disability finds it unduly burdensome to enter the polling place, the voter may be handed a ballot outside the polling place but within one hundred feet thereof by the precinct officials and in their presence but in a secret manner, mark and return the same to the precinct officials.

(b) The precinct officials shall enter in writing in the record book the following:

(1) The voter's name;

(2) The fact that the voter cannot read the names on the ballot, if that is the reason for

requiring assistance, and otherwise, the specific physical disability which requires the voter to receive assistance; and

(3) the name or names of the person or persons furnishing the assistance. [L 1970, c 26, pt of §2; am L 1972, c 158, §2; am L 1973, c 217, §1(tt); am L 1985, c 203, §5]

§11-140 Spoiled ballots. In elections using the paper ballot and electronic voting systems, if a voter spoils a ballot, the voter may obtain another upon returning the spoiled one. Before returning the spoiled ballot, the voter shall conform to the procedure promulgated by the chief election officer to retain the secrecy of the vote. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(uu); am L 1975, c 36, §1(11); am L 1980, c 264, §1(o); am L 1981, c 100, §1(3)]

PART X. VOTE DISPOSITION

§11-151 Vote count. Each contest or question on a ballot shall be counted independently as follows:

(1) If the votes cast in a contest or question are equal to or less than the number to be elected or chosen for that contest or question, the votes for that contest or question shall be counted.

(2) If the votes cast in a contest or question exceed the number to be elected or chosen for that contest or question, the votes for that contest or question shall not be counted.

(3) If a contest or question requires a majority of the votes for passage, any blank, spoiled,

or invalid ballot shall not be tallied for passage or as votes cast except that such ballots shall be counted as votes cast in ratification of a constitutional amendment. [L 1970, c 26, pt of §2; am L 1975, c 36, §1(12); am L 1986, c 305, §2]

§11-152 Method of counting. (a) In an election using the paper ballot voting system, immediately after the close of the polls, the chairman of the precinct officials shall open the ballot box. The precinct officials at the precinct shall proceed to count the votes as follows:

(1) The whole number of ballots shall first be counted to see if their number corresponds with the number of ballots cast as recorded by the precinct officials;

(2) If the number of ballots corresponds with the number of persons recorded by the precinct officials as having voted, the precinct officials shall then proceed to count the vote cast for each candidate;

(3) If there are more ballots or less ballots than the record calls for the precinct officials shall proceed as directed in section 11-153.

(b) In those precincts using the electronic voting system, the ballots shall be taken in the sealed ballot boxes to the counting center according to the procedure and schedule promulgated by the chief election officer to promote the security of the ballots. In the presence of official observers, counting center employees may start to count the ballots prior to the closing of the polls provided there shall be no printout by the computer or other disclosure of the number of votes cast for a candidate or on a question prior to the closing of the polls. [L 1970, c 26, pt

of §2; am L 1973, c 217, §1(vv); am L 1975, c 36, §1(13); am L 1977, c 189, §1(10); am L 1980, c 264, §1(p)]

§11-153 More or less ballots than recorded. If there are more ballots than the poll book indicates, this shall be an overage and if less ballots, it shall be an underage. The election officials or counting center employees responsible for the tabulation of ballots shall make a note of this fact on a form to be provided by the chief election officer. The form recording the overage or underage shall be sent directly to the chief election officer or the clerk in county elections separate and apart from the other election records.

If the electronic voting system is being used in an election, the overage or underage may be recorded after the tabulation of the ballots. In an election using the paper ballot voting system, the precinct officials shall proceed to count the vote cast for each candidate or on a question after recording the overage or underage.

As soon after the election as possible the chief election officer or the clerk shall make a list of all precincts in which an overage or underage occurred and the amount of the overage or underage. This list shall be kept as a public record in the office of the chief election officer or the clerk in county elections and the clerk's office in counties other than the city and county of Honolulu in elections involving state candidates.

An election contest may be brought under part XI, if the overage or underage in any district could affect the outcome of an election. [L 1970, c 26, pt of §2; am L 1975, c 36, §1(14)]

§11-154 Records, etc.; disposition. The final duty of the precinct officials in the operation of the precinct shall be to gather all records and supplies delivered to them and return them to the sending official, either the chief election officer or the county clerk.

The voted ballots shall be kept secure and handled only in the presence of representatives not of the same political party in accordance with regulations promulgated for the various voting systems. After all the ballots have been tabulated they shall be sealed in containers. Thereafter these containers shall be unsealed and resealed only as prescribed by rules and regulations governing the elections.

The ballots and other election records may be destroyed by the chief election officer or county clerk when all elected candidates have been certified by the chief election officer, or in the case of candidates for county offices, by the county clerk. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(ww)]

§11-155 Certification of results of election. On receipt of certified tabulations from the election officials concerned, the chief election officer or county clerk in county elections shall compile, certify, and release the election results after the expiration of the time for bringing an election contest. A certificate of election or a certificate of results declaring the results of the election as of election day shall be issued pursuant to section 11-156. The number of candidates to be elected receiving the highest number of votes in any election district shall be declared to be elected. Unless otherwise provided, the term of office shall begin or end as of the close of polls on

election day. The position on the question receiving the appropriate majority of the votes cast shall be reflected in a certificate of results issued pursuant to section 11-156. [L 1970, c 26, pt of §2; am L 1980, c 264, §1(b); am L 1986, c 305, §3]

§11-156 Certificate of election and certificate of results, form. The chief election officer or county clerk shall deliver certificates of election to the persons elected as determined under section 11-155. The chief election officer or county clerk in county elections shall issue certificates of results where a question has been voted upon. Certificates of election shall be delivered only after the filing of expense statements by the person elected in accordance with part XII and after the expiration of time for bringing an election contest. The certificate of election shall be substantially in the following form:

CERTIFICATE OF ELECTION

I,_____, chief election officer (county clerk) of Hawaii (county), do hereby certify that _____ was on the _____ day of _____19___, duly elected a _____ (name of office) for the _____ district for a term expiring on the _____ day of _____, A.D. 19___

Witness my hand this _____ day of _____, A.D. 19___

_____

Chief Election Officer (County Clerk)

The certificate of results shall be substantially in the following form:

CERTIFICATE OF RESULTS

I,_____, chief election officer (county clerk) of Hawaii (county), do hereby certify that _____ (question) was on the _____ day of _____ 19___, duly adopted (rejected) by a majority of the votes cast.

_____

Chief Election Officer (County Clerk)

If there is an election contest these certificates shall be delivered only after a final determination in the contest has been made and the time for an appeal has expired. [L 1970, c 26, pt of §2; am L 1986, c 305, §4]

§11-157 In case of tie. In case of the failure of an election by reason of the equality of vote between two or more candidates, the tie shall be decided by the chief election officer or county clerk in the case of county elections in accordance with the following procedure:

(1) In the case of an election involving a seat for the senate, house of representatives, board of education, or county council where only voters within a specified district are allowed to cast a vote, the winner shall be declared as follows:

(A) For each precinct in the affected district, an election rate point shall be calculated by dividing the total number of registered voters in that precinct by the total number of registered voters in the district. For the purpose of this subparagraph, the absentee votes cast for the affected district shall be treated as a precinct.

The election rate point shall be calculated by dividing the total absentee votes cast for the affected district by the total number of registered voters in that district. All election rate points shall be expressed as decimal fractions rounded to the nearest hundred thousandth.

(B) The candidate with the highest number of votes in a precinct shall be allocated the election rate point calculated under subparagraph (A) for that precinct. In the event that two or more persons are tied in receiving the highest number of votes for that precinct, the election rate point shall be equally apportioned among those candidates involved in that precinct tie.

(C) After the election rate points calculated under subparagraph (A) for all the precincts have been allocated as provided under subparagraph (B), the election rate points allocated to each candidate shall be tallied and the candidate with the highest election rate point total shall be declared the winner.

(D) If there is a tie between two or more candidates in the election rate point total, the candidate who is allocated the highest election rate points from the greatest number of precincts shall be declared the winner.

(2) In the case of an election involving a federal office or an elective office where the voters in the entire State or in an entire

county are allowed to cast a vote, the winner shall be declared as follows:

(A) For each representative district in the State or county, as the case may be, an election rate point shall be calculated by dividing the total number of registered voters in that representative district by the total number of registered voters in the State, county, or federal office district, as the case may be; provided that for purposes of this subparagraph:

(i) The absentee votes cast for a statewide, countywide, or federal office shall be treated as a separate representative district and the election rate point shall be calculated by dividing the total absentee votes cast for the statewide, countywide, or federal office by the total number of registered voters in the State, county, or federal office district, as the case may be.

(ii) The overseas votes cast for any election in the State for a federal office shall be treated as a separate representative district and the election rate point shall be calculated by dividing the total number of overseas votes cast for the affected federal office by the total number of registered voters in the affected federal office district. The term "overseas votes" means those votes

cast by absentee ballots for a presidential election as provided in section 15-3.

All election rate points shall be expressed as decimal fractions rounded to the nearest hundred thousandth.

(B) The candidate with the highest number of votes in a representative district shall be allocated the election rate point calculated under subparagraph (A) for that district. In the event that two or more persons are tied in receiving the highest number of votes for that district, the election rate point shall be equally apportioned among those candidates involved in that district tie.

(C) After the election rate points calculated under subparagraph (A) for all the precincts have been allocated as prescribed under subparagraph (B), the election rate points allocated to each candidate shall be tallied and the candidate with the election rate point total shall be declared the winner.

(D) If there is a tie between two or more candidates in the election rate point total, the candidate who is allocated the highest election rate points from the greatest number of representative districts shall be declared the winner. [L 1970, c 26, pt of §2; am imp L 1984, c 90, §1; am L 1990, c 198, §2]

PART I. NOMINATION; DETERMINATION OF CANDIDATES

§12-1 Application of chapter. All candidates for elective office, except as provided in section 14-21, shall be nominated in accordance with this chapter and not otherwise. [L 1970, c 26, pt of §2]

§12-1.5 REPEALED. L 1980, c 139, §1.

§12-3 Primary held when; candidates only those nominated. The primary shall be held at the polling place for each precinct on the second to the last Saturday of September in every even numbered year; provided that in no case shall any primary election precede a general election by less than forty-five days.

No person shall be a candidate for any general or special general election unless the person has been nominated in the immediately preceding primary or special primary. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(a); am L 1975, c 36, §2(1); am L 1976, c 106, §2(1); am L 1979, c 122, §2; am imp L 1984, c 90, §1]

§12-2.5 Nomination papers; when available. Nomination papers shall be made available from the first working day of February in every even-numbered year; provided that in the case of a special primary or special election, nomination papers shall be made available at least ten days prior to the close of filing. [L 1979, c 133, §7; am L 1990, c 35, §6]

§12-3 Nomination paper: format; limitations. (a) The name of no candidate shall be printed upon any official ballot to be used at any primary, special primary, or special election unless a nomination paper was filed in

the candidate's behalf and in the name by which the candidate is commonly known. The nomination paper shall be in a form prescribed by the chief election officer containing substantially the following information:

(1) A statement by the registered voters of the district from which the candidate is running signing the form that they are eligible to vote for the candidate at the next election;

(2) A statement by the registered voters signing the form that they nominate the candidate for the office on the nomination paper;

(3) The residence address and county in which the candidate resides;

(4) The name of the candidate and the office for which the candidate is running, which name and office are to be placed on the nomination paper by the chief election officer or the clerk prior to releasing the form to the candidate;

(5) Space for the names of the registered voters signing the form and their district or districts and precinct or precincts;

(6) A certification by the candidate that the candidate will qualify under the law for the office the candidate is seeking;

(7) A certification by a party candidate that the candidate is a member of the party;

(8) A certification, where applicable, by the candidate that the candidate has complied with the provisions of Article II, section 7, of the Constitution of the State of Hawaii; and

(9) The name the candidate wishes inserted on the ballot and the post office address of the candidate.

(b) No signatures shall be counted, unless they are upon the nomination paper having the format set forth above, written or printed thereon, and if there are separate sheets to be attached to the nomination paper, the sheets shall have the name of the person and the office for which the candidate is running placed thereon by the chief election officer or the clerk. The nomination paper and separate sheets shall be provided by the chief election officer or the clerk.

(c) Nomination papers shall not be filed in behalf of any person for more than one party or for more than one office; nor shall any person file nomination papers both as a party candidate and as a nonpartisan candidate.

(d) The office for which the candidate is running and the candidate's name may not be changed from that indicated on the nomination paper and separate sheets. If the candidate wishes to run for an office different from that for which the nomination paper states, the candidate may request the appropriate nomination paper from the chief election officer or clerk and have it signed by the required number of voters. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(b); am L 1975, c 36, §2(2); am L 1979, c 139, §6; am L 1980, c 264, §2; am L 1983, c 34, §19]

§12-4 Nomination papers: qualifications of signers. No person shall sign the nomination papers of more than one candidate, partisan or nonpartisan, for the same office, unless there is more than one office in a class in which case no person shall sign papers for more than

the actual number of offices in a class. Nomination papers shall be construed in this regard according to priority of filing, and the name of any person appearing thereon shall be counted only so long as this provision is not violated, and not thereafter.

No name on nomination papers shall be counted, unless the signer is a registered voter, eligible to vote for the candidate at the next election. To determine if the signers are eligible to vote for the candidate, the chief election officer or clerk may use lists prepared in accordance with section 11-24. [L 1970, c 26, pt of §2; am L 1974, c 34, §2(a)]

§12-5 Nomination papers: number of signers. (a) Nomination papers for candidates for members of congress, governor, lieutenant governor, and the board of education shall be signed by not less than twenty-five registered voters of the State or of the congressional district or school board district from which the candidates are running in the case of candidates for the United States House of Representatives or for the board of education.

(b) Nomination papers for candidates for either branch of the legislature and for county office shall be signed by not less than fifteen registered voters of the district or county or subdivision thereof for which the person nominated is a candidate.

(c) Nomination papers for candidates for members of the board of trustees of the office of Hawaiian affairs shall be signed by not less than twenty-five persons registered as prescribed under section 11-15(b).

(d) No signatures shall be required on nomination papers for candidates filing to run in a special primary or special election to fill a vacancy. [L 1970, c 26, pt of §2; am L 1979, c 196, §6; am L 1990, c 35, §7]

§12-6 Nomination papers: time for filing; fees. (a) Nomination papers shall be filed as follows: for members of Congress, state, and county offices, and the board of trustees of the office of Hawaiian affairs, with the chief election officer, or clerk in case of county offices, not later than 4:30 p.m. on the sixtieth calendar day prior to the primary, special primary, or special election provided that if such day is a Saturday, Sunday, or holiday then not later than 4:30 p.m. on the first working day immediately preceding. A state candidate from the counties of Hawaii, Maui, and Kauai may file the declaration of candidacy with the respective clerk. The clerk shall transmit to the office of the chief election officer the state candidate's declaration of candidacy without delay. However, if a special primary or special election is to be held by a county and the county charter requires that the council shall issue a proclamation calling for the election to be held within a specified period of time, and if that requirement would not allow the filing of nomination papers with the appropriate office by the sixtieth calendar day prior to the day for holding the special primary or special election, the council shall establish the deadline for the filing of nomination papers in the proclamation calling for the election.

(b) There shall be deposited with each nomination paper a filing fee on account of the expenses attending the holding of the primary, special primary, or special

election which shall be paid into the treasury of the State, or county, as the case may be, as a realization:

(1) For United States senators and United States representatives – $75;

(2) For governor and lieutenant governor – $750;

(3) For mayor – $500; and

(4) For all other offices – $250.

(c) Upon the receipt by the chief election officer or the clerk of the nomination paper of a candidate, the day, hour, and minute when it was received shall be endorsed thereon.

(d) Upon the showing of a certified copy of an affidavit which has been filed with the campaign spending commission pursuant to section 11-208 by a candidate who has voluntarily agreed to abide by spending limits, the chief election officer or clerk shall discount the filing fee of the candidate by the following amounts:

(1) For the office of governor and lieutenant governor – $675;

(2) For the office of mayor – $450; and

(3) For all other offices – $225.

(e) The chief election officer or clerk shall waive the filing fee in the case of a person who declares, by affidavit, that the person is indigent and who has filed a petition signed by currently registered voters who constitute at least one-half of one per cent of the total voters registered at the last preceding general election in the respective district or districts which correspond to the

specific office for which the indigent person is a candidate. This petition shall be submitted on the form prescribed and provided by the chief election officer together with the nomination paper required by this chapter. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(c); am L 1974, c 34, §2(b); am L 1975, c 36, §2(3); am L 1976, c 106, §2(2); am L 1977, c 189, §2(1); am L 1979, c 196, §7 and c 224, §5; am L 1983, c 34, §20]

§12-7 Filing of oath. The name of no candidate for any office shall be printed upon any official ballot, in any election, unless the candidate shall have taken and subscribed to the following written oath or affirmation, and filed the oath with the candidate's nomination papers.

The written oath or affirmation shall be in the following form:

"I, . . . , do solemnly swear and declare, on oath that if elected to office I will support and defend the Constitution and laws of the United States of America, and the Constitution and laws of the State of Hawaii, and will bear true faith and allegiance to the same; that if elected I will faithfully discharge my duties as . . . (name of office) . . . to the best of my ability; that I take this obligation freely, without any mental reservation or purpose of evasion; So help me God."

Upon being satisfied as to the sincerity of any person claiming that the person is unwilling to take the above prescribed oath only because the person is unwilling to be sworn, the person may be permitted, in lieu of the oath, to make the person's solemn affirmation which shall be in the same form as the oath except that the words "sincerely and truly affirm" shall be substituted for the

word "swear" and the phrases "on oath" and "So help me God" shall be omitted. Such affirmation shall be of the same force and effect as the prescribed oath.

The oath or affirmation shall be subscribed before the officer administering the same, who shall endorse thereon the fact that the oath was subscribed and sworn to or the affirmation was made together with the date thereof and affix the seal of the officer's office or of the court of which the officer is a judge or clerk.

It shall be the duty of every notary public or other public officer by law authorized to administer oaths to administer the oath or affirmation prescribed by this section and to furnish the required endorsement and authentication. [L 1970, c 26, pt of §2; am imp L 1984, c 90, §1]

§12-8 Nomination papers: challenge; evidentiary hearings and decisions. (a) All nomination papers filed in conformity with section 12-3 shall be deemed valid unless objection is made thereto by a registered voter, chief election officer or county clerk in writing not later than 4:30 p.m. on the thirtieth day or the next earliest working day prior to that election day. An objection in a primary or special election by a registered voter or county clerk shall be filed not later than 4:30 p.m. on the thirtieth day or the next earliest working day prior to that primary or special election day. In case objection is made, notice thereof shall be given including the placement of the notice in the mail by registered or certified mail to the candidate objected thereto.

(b) The chief election officer or the clerk in the case of county offices shall have the necessary powers and

authority to reach a preliminary decision on the merits of the objection; provided that nothing in this subsection shall be construed to extend to the candidate a right to an administrative contested case hearing as defined in section 91-1(5). The chief election officer or the clerk in the case of county offices shall render a preliminary decision not later than five working days after the objection is filed.

(c) If the chief election officer or clerk in the case of county offices determines that the objection may warrant the disqualification of the candidate, the chief election officer or clerk shall file a complaint in the circuit court for a determination of the objection; provided that such complaint shall be filed with the clerk of the circuit court not later than 4:30 p.m. on the seventh working day after the objection was filed.

(d) If the chief election officer or clerk in the case of county offices files a complaint in the circuit court the circuit court clerk shall issue to the defendants named in the complaint a summons to appear before the court not later [than] 4:30 p.m. on the fifth day after service thereof.

(e) The circuit court shall hear the complaint in a summary manner and at the hearing the court shall cause the evidence to be reduced to writing and shall not later than 4:30 p.m. on the fourth day after the return give judgment fully stating all findings of fact and of law. The judgment shall decide the objection presented in the complaint, and a certified copy of the judgment shall forthwith be served on the chief election officer or the clerk, as the case may be.

(f) If the judgment disqualifies the candidate, the chief election officer or the clerk shall follow the procedures set forth in sections 11-117 and 11-118 regarding the disqualifications of candidates.

(g) If an objection is made to the nomination papers of any candidate for the office of lieutenant governor pursuant to this section, the incumbent lieutenant governor shall be excused and the attorney general shall execute this section. The attorney general shall render a preliminary decision not later than five working days after the objection is filed. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(d); am L 1975, c 36, §2(4); am L 1977, c 189, §2(2); am L 1990, c 125, §1]

§12-9. List of candidates. As soon as possible but not later than 4:30 p.m. on the fifth day after the close of filing the chief election officer shall transmit to each county clerk and the county clerk shall transmit to the chief election officer certified lists containing the names of all persons, the office for which each is a candidate, and their party designation, or designation of nonpartisanship, as the case may be, for whom nomination papers have been duly filed in his office and who are entitled to be voted for at the primary, special primary or special election. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(e)]

PART II. BALLOTS

§12-21 Official party ballots. The primary or special primary ballot shall be clearly designated as such. The names of the candidates of each party qualifying under section 11-61 or 11-62 and of nonpartisan candidates may be printed on separate ballots, or on a single ballot. The name of each party and the nonpartisan designation shall be distinctly printed and sufficiently separate from each other. The names of all candidates shall be printed on the ballot as provided in section 11-115. When the names of all candidates of the same party for the same office exceed the maximum number of voting positions on a single side of a ballot card, the excess names may be arranged and listed on both sides of the ballot card and additional ballot cards if necessary. When separate ballots for each party are not used, the order in which parties appear on the ballot, including nonpartisan, shall be determined by lot.

The chief election officer or the county clerk, in the case of county elections, shall approve printed samples or proofs of the respective party ballots as to uniformity of size, weight, shape, and thickness prior to final printing of the official ballots. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(f); am L 1979, c 139, §7; am L 1981, c 214, §1; am L 1987, c 232, §2]

§12-22 Official nonpartisan ballots. There shall be only one primary or special primary ballot containing the names of all nonpartisan candidates to be voted for and the offices for which they are candidates. The ballot shall be clearly designated as the nonpartisan primary or special primary ballot and shall conform in all other respects

to the requirements relative to official party ballots. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(g); am L 1979, c 139, §8]

PART III. BALLOT SELECTION

§12-31 Selection of party ballot; voting. No person eligible to vote in any primary or special primary election shall be required to state a party preference or nonpartisanship as a condition of voting. Each voter shall be issued the primary or special primary ballot for each party and the nonpartisan primary or special primary ballot. A voter shall be entitled to vote only for candidates of one party or only for nonpartisan candidates. If the primary or special primary ballot is marked contrary to this paragraph, the ballot shall not be counted.

In any primary or special primary election in the year 1979 and thereafter, a voter shall be entitled to select and to vote the ballot of any one party or nonpartisan, regardless of which ballot the voter voted in any preceding primary or special primary election. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(i); am L 1974, c 34, §2(c); am L 1979, c 139, §9; am imp L 1984, c 90, §1]

PART IV. ELECTION RESULTS

§12-41 Result of election. (a) The person or persons receiving the greatest number of votes at the primary or special primary as a candidate of a party for an office shall be the candidate of the party at the following general or special general election but not more candidates for a party than there are offices to be elected; provided

that any candidate for any county office who is the sole candidate for that office at the primary or special primary election, or who would not be opposed in the general or special general election by any candidate running on any other ticket, nonpartisan or otherwise, and who is nominated at the primary or special primary election shall, after the primary or special primary election, be declared to be duly and legally elected to the office for which the person was a candidate regardless of the number of votes received by that candidate.

(b) Any nonpartisan candidate receiving at least ten per cent of the total votes cast for the office for which the person is a candidate at the primary or special primary, or a vote equal to the lowest vote received by the partisan candidate who was nominated in the primary or special primary, shall also be a candidate at the following election; provided that when more nonpartisan candidates qualify for nomination than there are offices to be voted for at the general or special general election, there shall be certified as candidates for the following election those receiving the highest number of votes, but not more candidates than are to be elected. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(j); am L 1979, c 139, §10; am L 1983, c 34, §21]

§12-42 Unopposed candidates declared elected. (a) Any candidate running for any office in the State of Hawaii in a special election or special primary election who is the sole candidate for that office shall, after the close of filing of nomination papers, be deemed and declared to be duly and legally elected to the office for which the person is a candidate. The term of office for a candidate elected under this subsection shall begin

respectively on the day of the special election or on the day of the immediately succeeding special general election.

(b) Any candidate running for any office in the State of Hawaii in a special general election who was only opposed by a candidate or candidates running on the same ticket in the special primary election and is not opposed by any candidate running on any other ticket, nonpartisan or otherwise, and is nominated at the special primary election shall, after the special primary, be deemed and declared to be duly and legally elected to the office for which the person is a candidate at the special primary election regardless of the number of votes received. The term of office for a candidate elected under this subsection shall begin on the day of the special general election. [L 1974, c 34, §2(d); am L 1985, c 203, §6]

PART I. GENERAL PROVISIONS

§16-1 Voting systems authorized. The chief election officer may adopt, experiment with, or abandon any voting system authorized under this chapter or to be authorized by the legislature. These systems shall include, but not be limited to voting machines, paper ballots, and electronic voting systems. All voting systems approved by the chief election officer under this chapter are authorized for use in all elections for voting, registering, and counting votes cast at the election.

Voting systems of different kinds may, at the discretion of the chief election officer, be adopted for different precincts within the same district. The chief election officer may provide for the experimental use at any election,

in one or more precincts, of a voting system without a formal adoption thereof and its use at the election shall be as valid for all purposes as if it had been permanently adopted; provided that if a voting machine is used experimentally under this paragraph it need not meet the requirements of section 16-12. [L 1970, c 26, pt of §2]

§16-2 Voting system requirements. All voting systems adopted under this chapter by the chief election officer or the legislature shall satisfy the following requirements:

(1) It shall secure to the voter secrecy in the act of voting;

(2) It shall provide for voting for all candidates of as many political parties as may make nominations, nonpartisans, and for or against as many questions as are submitted;

(3) It shall correctly register or record and accurately count all votes cast for any and all persons, and for or against any and all questions. [L 1970, c 26, pt of §2]

PART II. VOTING MACHINE SYSTEM

§16-11 Definitions. "Protective counter" means an apparatus built into the voting machine which cannot be reset, which records the total movement of the operating lever.

"Voting machine system" means the method of electrically, mechanically, or electronically recording and counting votes upon being cast. [L 1970, c 26, pt of §2; am L 1975, c 36, §5(2)]

Revision Note

Definitions rearranged.

§16-12 Voting machines; requirements. No voting machine shall be installed for use in any election in the State unless it shall satisfy the following requirements:

(1) It shall permit the voter to vote for as many persons for an office as the voter is lawfully entitled to vote for, but no more;

(2) It shall prevent the voter from voting for the same persons more than once for the same office;

(3) It shall permit the voter to vote for or against any question the voter may have the right to vote on, but no other;

(4) In special primary and primary elections it shall be so equipped that it will lock out all rows except those of the party or nonpartisan candidates selected by the voter;

(5) It shall be provided with a protective counter or protective device whereby any operation of the machine before or after the election will be detected;

(6) It shall be provided with a counter which shall show at all times during an election how many persons have voted;

(7) It shall be provided with a mechanical model, illustrating the manner of voting on the machine, suitable for the instruction of voters. [L 1970, c 26, pt of §2; am L 1973, c 217, §6(a); am L 1980, c 64, §5(a); am imp L 1984, c 90, §1]

PART III. PAPER BALLOT VOTING SYSTEM

§16-21 Definition. "Paper ballot voting system" means the method of recording votes which are counted manually. [L 1970, c 26, pt of §2; am L 1975, c 36, §5(4)]

§16-22 Marking. The method of marking a paper ballot shall be prescribed by the chief election officer by rules and regulations promulgated in accordance with chapter 91. The chief election officer shall prescribe a uniform method of marking the ballots in all precincts in a county and for absentee voting by paper ballot. [L 1970, c 26, pt of §2; am imp L 1984, c 90, §1]

§16-23 Paper ballot; voting. Upon receiving the ballot the voter shall proceed into one of the voting booths provided for the purpose, and shall mark the voter's ballot in the manner prescribed by section 16-22.

The voter shall then leave the booth and deliver the ballot to the precinct official in charge of the ballot boxes. The precinct official shall be sufficiently satisfied that there is but one ballot enclosed, whereupon the ballot shall be immediately dropped into the proper box by the precinct official. [L 1970, c 26, pt of §2; am L 1973, c 217, §6(b); am L 1977, c 189, §4; am imp L 1984, c 90, §1]

§16-24 Count, public. Insofar as the limits of the room in which the voting takes place reasonably allow, no person shall be prevented from attending the counting of the ballots on election day, unless it is necessary to preserve the peace. [L 1970, c 26, pt of §2]

§16-25 Order and method of counting. Each ballot shall be counted and finished as to all the candidates thereon before counting a second and subsequent ballots.

Except as provided in section 11-71, the ballots shall be counted by teams in the following manner only: by one precinct official announcing the vote in a loud clear voice, one precinct official tallying the vote, one precinct official watching the precinct official announcing the vote and one precinct official watching the precinct official tallying the vote. The precinct official doing the announcing or tallying and the precinct official watching him shall not be of the same political party. [L 1970, c 26, pt of §2; am L 1973, c 217, §6(c)]

§16-26 Questionable ballots. A ballot shall be questionable if:

(1) A ballot contains any mark or symbol whereby it can be identified, or any mark or symbol contrary to the provisions of law; or

(2) Two or more ballots are found in the ballot box so folded together as to make it clearly evident that more than one ballot was put in by one person, the ballots shall be set aside as provided below.

Each ballot which is held to be questionable shall be endorsed on the back by the chairman of precinct officials with the chairman's name or initials, and the word "questionable". All questionable ballots shall be set aside uncounted and disposed of as provided for ballots in section 11-154. [L 1970, c 26, pt of §2; am L 1973, c 217, §6(d); am imp L 1984, c 90, §1]

§16-27 Number of blank and questionable ballots; record of. In addition to the count of the valid ballots, the precinct official shall, as to each separate official ballot, also determine and record the number of totally blank

ballots and the number of questionable ballots. [L 1970, c 26, pt of §2; am L 1973, c 217, §6(c)]

§16-28 Declaration of results. When the precinct officials have ascertained the number of votes given for each candidate they shall make public declaration of the whole number of votes cast, the names of the persons voted for, and the number of votes for each person. [L 1970, c 26, pt of §2; am L 1973, c 217, §6(f)]

§16-29 Tally sheets. The tally sheets used in counting the ballots cast shall be marked and handled in a secure fashion prescribed in rules and regulations promulgated by the chief election officer in accordance with chapter 91. [L 1970, c 26, pt of §2]

* * *

CHAPTER 17 [NEW]
VACANCIES

§17.1 United States senator. When a vacancy occurs in the office of United States senator the vacancy shall be filled for the unexpired term at the following state general election, provided that the vacancy occurs not later than 4:30 p.m. on the sixtieth day prior to the primary for nominating candidates to be voted for at the election; otherwise at the state general election next following. The chief election officer shall issue a proclamation designating the election for filling vacancy. Pending the election the governor shall make a temporary appointment to fill the vacancy and the person so appointed shall serve until the election and qualification of the person duly elected to fill the vacancy and shall be a registered member of the same political party as the senator causing the vacancy. All candidates for the unexpired term shall be nominated

and elected in accordance with this title. [L 1970, c 26, pt of §2; am L 1973, c 217, §7(a)]

§17-2 United States representative. When a vacancy occurs in the representation of this State in the United States House of Representatives, the chief election officer shall issue a proclamation for an election to fill the vacancy. The proclamation shall be issued not later than on the sixtieth day prior to the election to fill the vacancy and shall contain the date, time, and places where the special election is to be held, the time within which nomination papers shall be filed, the time for transmitting to county clerks the notice designating the offices for which candidates are to be elected, the time for transmitting to county clerks lists of candidates to be voted for at the special election and such other matter as provided for in section 11-91 and which are not inconsistent with this section. The special election shall be conducted and the results ascertained so far as practicable, in accordance with this title. [L 1970, c 26, pt of §2; am L 1973, c 217, §7(b); am L 1974, c 34, §4(a); am imp L 1984, c 90, §1; am L 1986, c 305, §6]

§17-3 State senator. (a) Whenever any vacancy in the membership of the state senate occurs, the term of which ends at the next succeeding general election, the governor shall make an appointment to fill the vacancy for the unexpired term and the appointee shall be of the same political party or nonpartisanship as the person the appointee succeeds.

(b) In the case of vacancy, the term of which does not end at the next succeeding general election:

(1) If it occurs not later than on the tenth day prior to the close of filing for the next succeeding primary election, the vacancy shall be filled for the unexpired term at the next succeeding general election. The chief election officer shall issue a proclamation designating the election for filling the vacancy. All candidates for the unexpired term shall be nominated and elected in accordance with this title. Pending the election the governor shall make a temporary appointment to fill the vacancy and the person so appointed shall serve until the election of the person duly elected to fill the vacancy. The appointee shall be of the same political party or nonpartisanship as the person the appointee succeeds.

(2) If it occurs later than on the tenth day prior to the close of filing for the next succeeding primary election but not later than on the sixtieth day prior to the next succeeding primary election, or if there are no qualified candidates for any party or nonpartisan candidates qualified for the primary election ballot, nominations for the unexpired term may be filed not later than 4:30 p.m. on the fiftieth day prior to the next succeeding primary election. The chief election officer shall issue a proclamation designating the election for filling the vacancy. Pending the election the governor shall make a temporary appointment to fill the vacancy and the person so appointed shall serve until the election of the person duly elected to fill the vacancy. The appointee shall be of the same political party or nonpartisanship as the person the appointee succeeds.

(3) If it occurs after the sixtieth day prior to the next succeeding primary but not later than on the fiftieth day prior to the next succeeding general election, or if there are no qualified candidates for any party or nonpartisan candidates in the primary, the vacancy shall be filled for the unexpired term at the next succeeding general election. The chief election officer shall issue a proclamation designating the election for filling the vacancy. Party candidates for the unexpired senate term shall be nominated by the county committees of the parties not later than 4:30 p.m. on the fortieth day prior to the general election; nonpartisan candidates may file nomination papers for the unexpired term not later than 4:30 p.m. on the fortieth day prior to the general election with the nonpartisan candidate who is to be nominated to be decided by lot, under the supervision of the chief election officer. The candidates for the unexpired term shall be elected in accordance with this title. Pending the election the governor shall make a temporary appointment to fill the vacancy and the person so appointed shall serve until the election of the person duly elected to fill such vacancy. The appointee shall be of the same political party or nonpartisanship as the person the appointee succeeds.

(4) If it occurs after the fiftieth day prior to the next succeeding general election or if no candidates are nominated, the governor shall make an appointment to fill the vacancy for the unexpired term and the appointee shall be of the same political party or nonpartisanship as the person the appointee succeeds. [L 1970, c 26, pt of §2; am L 1973, c 217, §7(c); am L 1980, c 247, §2; am imp L 1984, c 90, §1; am L 1990, c 35, §2]

§17-4 State representatives. Whenever any vacancy in the membership of the state house of representatives occurs, the governor shall make an appointment to fill the vacancy for the unexpired term and the appointee shall be of the same political party as the person the appointee succeeds. [L 1970, c 26, pt of §2; am imp L 1984, c 90, §1]

• • •

[In 1986, the Hawaii Legislature amended sections 11-61, 11-62, and 11-63, of the Hawaii Revised Statutes. The following is, in its entirety, Hawaii House Standing Committee Report No. 762-86, *reprinted from* 1986 Haw. H.J. 1370, which explains the origins and purpose of the bill that became law in 1986.]

SCRep. 762-86 Judiciary on H.B. No. 303

The purpose of this bill is to amend the requirements by which a political party qualifies and remains qualified to appear on the ballot in State elections.

The bill provides that a party may qualify by petition as well as by election result. The bill further provides that if a party qualifies through petition for three consecutive general elections, it will be deemed a political party for the following ten year period.

Your Committee heard testimony in support of the bill from the Lieutenant Governor and the Libertarian Party of Hawaii. The Libertarian Party testified that it is sometimes difficult to field a sufficient number of candidates to remain qualified as a party and further that the percentage of votes required to remain qualified is among the highest in the nation.

Your Committee finds that qualifying by petition is an acceptable alternative to qualifying by election results which is a continuous process.

Your Committee amended the bill to delete the provision that parties previously qualified under section 11-61, HRS, requalify after the bill is passed. Your Committee believes that parties presently qualified should not have to immediately requalify.

Your Committee further amended the bill to require that a party who qualifies by petition continue to field candidates for political office during the ten year period following qualification. Your Committee believes that the party must continue to field candidates in order to remain a viable party.

Your Committee also made certain technical, nonsubstantive amendments for style and clarity.

Your Committee on Judiciary is in accord with the intent and purpose of S.B. No. 303, S.D. 1, as amended herein, and recommends that it pass Second Reading in the form attached hereto as S.B. No. 303, S.D. 1, H.D. 1, and be placed on the calendar for Third Reading.

Signed by all members of the Committee.

* * *

[At the general election of 1988, Article III, § 4 of the Hawaii Constitution of 1978 was amended to read as follows:]

ELECTION OF MEMBERS; TERM

Section 4. Each member of the legislature shall be elected at an election. If more than one candidate has been nominated for election to a seat in the legislature, the member occupying that seat shall be elected at a general election. If a candidate nominated for a seat at a primary election is unopposed for that seat at the general election the candidate shall be deemed elected at the primary election. The term of office of a member of the house of representatives shall be two years and the term of office of a member of the senate shall be four years. The term of a member of the legislature shall begin on the day of the general election at which elected or if elected at a primary election on the day of the general election immediately following the primary election at which elected. For a member of the house of representatives, the term shall end on the day of the general election immediately following the day the member's term commences. For a member of the senate, the term shall end on the day of the second general election immediately following the day the member's term commences. [Ren Const Con 1978 and election Nov 7, 1978; am HB 572 (1987) and election Nov 8, 1988]

APPENDIX "B"

LAWS

OF

HER MAJESTY LILIUOKALANI

QUEEN OF THE HAWAIIAN ISLANDS,

PASSED BY THE

LEGISLATIVE ASSEMBLY

AT ITS SESSION

1892.

Printed by Order of the Government

LAWS

OF THE

PROVISIONAL GOVERNMENT

OF THE

HAWAIIAN ISLANDS,

PASSED BY THE

EXECUTIVE AND ADVISORY COUNCILS.

ACTS 1 TO 86.

CHAPTER LXXIX.

AN ACT

TO AMEND SECTIONS 22, 47, 49, 56, 75, AND SUB-SECTIONS 1 AND 3 OF SECTION 108 OF CHAPTER LXXXVI. OF THE SESSION LAWS OF 1890, OTHERWISE KNOWN AS THE "ELECTION LAW".

Be it Enacted by the Queen and the Legislature of the Hawaiian Kingdom:

SECTION 1. Section 22 of Chapter LXXXVI. of the Session Laws of 1890, is hereby amended so as to read as follows:

"Section 22. No person shall be eligible for election, or shall be permitted to hold a seat as a member of the Hawaiian Legislature, either as a Noble or as a Representative, who shall be under any of the disqualifications mentioned in Section 25, or elsewhere in this Act; or who shall hold any office or offices of trust or profit under any department of the Government; or who shall have any direct pecuniary interest in any contract or contracts with the Government or any department thereof.

"No member of the Legislature shall during the term for which he was elected, be appointed to any civil office under the Government, unless such office carries with it the right to a seat in the Legislature."

SECTION 2. Section 47 of the said Act is hereby amended so as to read as follows:

"Section 47. No person shall be permitted to stand as a candidate for election unless he shall be so requested in writing, signed by not less than twenty-five duly qualified electors of the district in which such election is

ordered; which request shall be deposited with the Minister of the Interior not less than twenty-one days before the day of such election; except on the Island of Oahu, where such request shall be deposited not less than seven days before the day of such election, together with a fee of twenty-five dollars for a candidate for Representative, and fifty dollars for a candidate for Noble on account of the expenses attending the election, which amounts shall be paid into the Treasury as a Government realization.

"Any candidate may withdraw before an election by giving notice to the Minister of the Interior in writing; and if such notice of withdrawal on the part of any candidate be filed in the Interior Office before the printing of the ballots, the fee previously deposited with his application shall be returned to him.

"If such notice of withdrawal shall not be given before the printing of the ballots, as prescribed in Section 58, the inspectors of Election shall, upon receiving due notice of such withdrawal from the Minister of the Interior, efface by suitable means such name from the ballots before distributing the same to individual voters.

"Provided, however, that in case of the withdrawal or decease of a candidate, a new nomination to fill such vacancy and a new application to the Minister of the Interior may be made irrespective of the aforesaid limit of time, and in such case the law governing the construction of application papers and fee to be deposited with the same, shall hold good."

SECTION 3. Section 49 of the said Act is hereby amended so as to read as follows:

"Section 49. Within ten days following an election each candidate shall furnish to the Minister of the Interior an itemized statement of his expenses as candidate for election, which statement shall be sworn to and shall be open to the inspection of any one.

"Provided, however, that if a candidate has incurred no expenses on account of such election, he shall be held liable to fine if he shall not furnish the Minister of the Interior with a sworn statement to that effect. The fine shall be the same as provided for a failure to furnish a statement of expenses when any are incurred.

"The expenses to be legally incurred by or for a candidate for election of Noble or Representative, or member of Road Board, shall be:

"1. His personal expenses as a candidate.

"2. Expenses of printing and advertising.

"3. Cost of stationery and postage.

"4. Expenses of public meetings.

"5. Rent and supplies of committee rooms, not to exceed one for each polling place."

SECTION 4. Section 56 of the said Act is hereby amended so as to read as follows:

"Section 56. The ballot for Representatives shall be of white paper and the ballot for Nobles of blue paper. Specifmen ballots shall be of white or blue paper. The paper shall be of uniform weight, thickness, and of the same sizing color. It shall bear no word, motto, device, sign or symbol other than allowed by this Section, and

shall be so printed that the type shall not show a trace on the back. Besides the name or names of candidates to be voted for, it shall contain only the words as follows:

"(General or Special) Election for the year. . . . Name and period of the office to be filled.

"Name of the division for Nobles, or the name of the District for Representatives printed in English and Hawaiian. The names of the several candidates may be printed, if English, with the Hawaiian equivalent, if Hawaiian, with English equivalent, if such exist.

"Between each name and its equivalent and the next name a horizontal line shall be ruled; and immediately after all the names a vertical line shall be ruled, enclosing a rectangular space in continuation of each name and its equivalent in which the cross mark is to be placed in voting."

SECTION 5. Section 75 of the said Act is hereby amended by having a new sub-section introduced as follows, which new sub-section shall be numbered 5:

"5. In cases where general and special elections are held at the same time and are incorporated upon the same ballot if the provisions of sub section 1 be violated in one or more of the several elections thus held upon one ballot; the whole ballot shall not be considered as invalid, but only the election or elections special or general in which such violation occurs.

SECTION 6. Sub-sections 1 and 3 of Section 108 of the said Act are hereby amended so as to read as follows:

"1. The voter is to vote for one candidate for Representative. The voter is to vote for

. . . . . candidates for Nobles, 6 years.

. . . . . candidates for Nobles, 4 years;

. . . . . candidates for Nobles, 2 years.

"3. Immediately upon receiving his folded ballot or ballots from the appointed officer the voter must go into one of the compartments, and with the pencil there provided, mark a cross on the ballot in the rectangular space thereon provided in continuation of the name of the candidate for whom he wishes to vote, thus, X."

Approved this 3d day of January, A. D. 1893.

LILIUOKALANI R.

By the Queen:
G. N. Wilcox,
Minister of the Interior.

PROCLAMATION.

In its earlier history Hawaii possessed a Constitutional Government honestly and economically administered in the public interest.

The Crown called to its assistance as advisers able, honest and conservative men whose integrity was unquestioned even by their political opponents.

The stability of the Government was assured, armed resistance and revolution unthought of, popular rights were respected and the privileges of the subject from time

to time increased and the prerogatives of the Sovereign diminished by the voluntary acts of the successive Kings.

With very few exceptions this state of affairs continued until the expiration of the first few years of the reign of His late Majesty Kalakaua. At this time a change was discernable in the spirit animating the chief executive and in the influences surrounding the Throne. A steadily increasing disposition was manifested on the part of the King to extend the Royal prerogatives; to favor adventurers and persons of no character or standing in the community; to encroach upon the rights and privileges of the people by steadily increasing corruption of electors, and by means of the power and influence of office holders and other corrupt means to illegitimately influence the elections, resulting in the final absolute control of not only the executive and legislative, but to a certain extent the judicial departments of the government, in the interest of absolutism.

This finally resulted in the revulsion of feeling and popular uprising of 1887 which wrested from the King a large portion of his ill-gotton powers.

The leaders of this movement were not seeking personal aggrandizement, political power or the suppression of the native government. If this had been their object it could easily have been accomplished, for they had the absolute control of the situation.

Their object was to secure responsible government through a representative Cabinet, supported by and responsible to the people's elected representatives. A clause to this effect was inserted in the Constitution and

subsequently enacted by law by the Legislature, specifically covering the ground that is all matters concerning the State the Sovereign was to act by and with the advice of the Cabinet and only by and with such advice.

The King willingly agreed to such proposition, expressed regret for the past, and volunteered promises for the future.

Almost from the date of such agreement and promises up to the time of his death, the history of the Government has been a continual struggle between the King on the one hand and the Cabinet and the Legislature on the other, the format constantly endeavoring by every available form of influence and evasion to ignore his promise and agreements and regain his lost powers.

This conflict upon several occasions came to a crisis, followed each time by submission on the part of His Majesty by renewed expressions of regret and promises to abide by the constitutional and legal restrictions to the future. In each instance such promise was kept until a further opportunity presented itself, when the conflict was renewed in defiance and regardless of all previous pledges.

Upon the accession of Her Majesty Liliuokalani, for a brief period the hope prevailed that a new policy would be adopted. This hope was soon blasted by her immediately entering into conflict with the existing Cabinet, who held office with the approval of a large majority of the Legislature, resulting on the triumph of the Queen and the removal of the Cabinet. The appointment of a new Cabinet subservient to her wishes and their continuance in office until a recent date gave no opportunity for

further indication of the policy which would be pursued by Her Majesty until the opening of the Legislature in May of 1892.

The recent history of that session has shown a stubborn determination on the part of Her Majesty to follow the tactics of her late brother, and in all possible ways to secure an extension of the royal prerogatives and an abridgment of popular rights.

During the latter part of the session, the Legislature was replete with corruption; bribery and other illegitimate influences were openly utilized to secure the desired end, resulting in the final complete overthrow of all opposition and the inauguration of a Cabinet arbitrarily selected by Her Majesty in complete defiance of constitutional principles and popular representation.

Notwithstanding such result the defeated party peacefully submitted to the situation.

Not content with her victory, Her Majesty proceeded on the last day of the session to arbitrarily arrogate to herself the right to promulgate a new Constitution, which proposed among other things to disfranchise over one-fourth of the voters and the owners of nine-tenths of the private property of the Kingdom, to abolish the elected upper House of the Legislature and to substitute in place thereof an appointive one to be appointed by the Sovereign.

The detailed history of this attempt and the succeeding events in connection therewith is given in the report of the Committee of Public Safety to the citizens of Honolulu and the Resolution adopted at the Mass Meeting

held on the 16th inst., the correctness of which report and the propriety of which resolution is hereby specifically affirmed.

The constitutional evolution indicated has slowly and steadily, though reluctantly and regretfully, convinced an overwhelming majority of the conservative and responsible members of the community that independent, constitutional, representative and responsible government, able to protect itself from revolutionary uprisings and royal aggression is no longer possible in Hawaii under the existing system of government.

Five uprisings or conspiracies against the Government have occurred within five years and seven months. It is firmly believed that the culminating revolutionary attempt of last Saturday will, unless radical measures are taken, wreck our already damaged credit abroad and precipitate to final ruin our already overstrained financial condition; and the guarantees of protection to life, liberty and property will steadily decrease and the political situation grow rapidly worse.

In this belief, and in the firm belief that the action hereby taken is and will be for the best personal, political and property interests of every citizen of the land.

We, citizens and residents of the Hawaiian Islands, organized and acting for the public safety and the common good, hereby proclaim as follows:

1. The Hawaiian Monarchical system of Government is hereby abrogated.

2. A Provisional Government for the control and management of public affairs and the protection of the

public peace is hereby established, to exist until terms of union with the United States of America have been negotiated and agreed upon.

3. Such Provisional Government shall consist of an Executive Council of four members, who are hereby declared to be

S. B. DOLE,
J. A. KING,
P. C. JONES,
W. O. SMITH,

who shall administer the Executive Departments of the Government, the first named acting as President and Chairman of such Council and administering the Department of Foreign Affairs, and the others severally administering the Departments of Interior, Finance and Attorney-General, respectively, in the order in which they are above enumerated, according to existing Hawaiian Law as far as may be consistent with this Proclamation; and also of an Advisory Council which shall consist of fourteen members who are hereby declared to be

S. M. DAMON,
L. A. THURSTON,
J. EMMELUTH,
J. A. McCANDLESS,
F. W. McCHESNEY,
W. R. CASTLE,
W. C. WILDER,
A. BROWN,
J. F. MORGAN,
H. WATERHOUSE,
E. D. TENNY,
F. WILHELM,
W. G. ASHLEY,
C. BOLTE.

Such Advisory Council shall also have general legislative authority.

Such Executive and Advisory Councils shall, acting jointly, have power to remove any member of either Council and to fill such or any other vacancy.

4. All officers under the existing Government are hereby requested to continue to exercise their functions and perform the duties of their respective offices, with the exception of the following named persons:

QUEEN LILIUOKALANI,
CHARLES B. WILSON, MARSHAL,
SAMUEL PARKER, Minister of Foreign Affairs,
W. H. CORNWELL, Minister of Finance,
JOHN F. COLBURN, Minister of the Interior,
ARTHUR P. PETERSON, Attorney-General,

who are hereby removed from office.

5. All Hawaiian Laws and Constitutional principles not inconsistent herewith shall continue in force until further order of the Executive and Advisory Councils.

(Signed) HENRY E. COOPER,
(Chairman),
ANDREW BROWN,
JOHN EMMELUTH,
ED. SUHR,
W. C. WILDER,
WM. O. SMITH,
WM. R. CASTLE,
THEODORE F. LANSING,
C. BOLTE,
HENRY WATERHOUSE,
F. W. McCHESNEY,
LORRIN A. THURSTON,
J. A. McCANDLESS,
Committee of Safety.

HONOLULU, H. I., JANUARY 17TH, 1893.

APPENDIX "C"

Article I, § 4, clause 1 of the Constitution provides that:

> The Times, Places and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]

Article II, § 1, clause 2 of the Constitution provides that:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress[.]

The Tenth Amendment to the Constitution provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.
